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1793

THE
CANADIAN
LAW TIMES

Edited by
E. DOUGLAS ARMOUR, Q.C.,
Of Osgoode Hall, Barrister-at-Law.

VOL. XV.

TORONTO :
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1895.



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THE CANADIAN LAW TIMES.

JANUARY, 1895.

POWERS OF SALE WITHOUT NOTICE.

This question has recently been discussed in two papers which appeared in the issues of this journal of date February and December, 1893, respectively, the one by Mr. A. C. Galt, and the other by Mr. H. Symons, as well as in a subsequent letter from Mr. Galt which appears in the issue of February, 1894. The question strikes us as one of more than ordinary practical importance, inasmuch as it is by no means an uncommon practice at the present day to insert in mortgages a power of sale of the character impugned, and to proceed thereunder in case of default, so that if the view advocated by Mr. Galt is just, it is obvious that it cannot be too soon generally understood and recognized.

Perhaps this may serve as an excuse for an additional word upon the subject.

The quotation with which Mr. Galt heads his paper would seem to indicate that he, perhaps, scarcely approaches the subject in that judicial frame of mind which a calm consideration of its merits demands.

The fair inference would seem to be that mortgagees are regarded by Mr. Galt as a crafty and rapacious class of people, ever on the watch to ensnare the simple and confiding mortgagor, abundantly content, doubtless, to risk their money on dubious security, if only they may

thereby obtain an opportunity of selling out their victim under a power of sale or some similar iniquitous device.

This view is scarcely, we think, borne out by the facts. Mortgagees are a cautious, and even timorous, class of people, who take anxious pains, before advancing a penny, to assure themselves that the security offered is ample; and, so far from being attracted by, would recoil in alarm from, the idea that it might become necessary to realize their security by legal proceedings. Mortgagors, on the other hand, with such assistance as they readily find at hand, notably that of paternally inclined members of Parliament, solicitous to relieve them of all obligation to repay their honest debts, are, on the whole, we think, tolerably well able to look after their own interests.

Another error that seems to pervade the article in question, is the assumption that a power of sale is a device adopted solely in the interest of the mortgagee. As a matter of fact, such powers are quite as much for the benefit of the mortgagor. In dealings between mortgagor and mortgagee, it is manifestly to the advantage of both parties that as few obstacles as possible be placed in the way of the ready realization of the security in case of default. The more cumbrous the machinery for this purpose, the more disadvantageous will be the terms on which mortgagors will be obliged to negotiate their loans. What mortgagees want is security for their money and a simple and ready means of recovering it by compulsory process in case the mortgagor makes default, and that is, or ought to be, precisely what the mortgagor desires to give them. The principle referred to is, we think, generally recognized and is well expressed by Mr. Davidson in his work on conveyancing, 4th Edition, Vol. II. part II. p. 45. "It may be worth remarking that the many and stringent precautions taken for improving the security and remedies of the mortgagee, would be very erroneously viewed if they were looked upon as adverse to the mortgagor. It is, on the contrary, highly important to the borrower on mortgagor that the position

of the lender should be rendered as strong and secure as possible; as, the safer and more marketable the security, the better, in general, will be the terms, and the greater the facility of borrowing." And at p. 66, "Generally speaking it is for the interest both of mortgagor and mortgagee that the latter should be armed with this remedy" [power of sale] "by which in case of any difficulty in obtaining repayment, he is enabled to sell the estate and repay himself out of the proceeds, instead of being driven to the tedious and expensive resort of a suit for foreclosure."

There is perhaps also another error underlying the paper in question. Mr. Galt treats the exercise of a power of sale as though it were in fact equivalent to a foreclosure (a). At first blush, that might seem a not unfair view to take of it, but a moment's consideration will show that the two are, especially in regard to their attributes at present under discussion, *toto cœlo* of a different nature. It is true that in one sense the result to the mortgagor is the same; in either case he loses his land, but in the case of a foreclosure he not only loses his land, but all interest in the mortgaged property, whether in the shape of the original land or the purchase money into which it may be converted in case the mortgagee sells after completion of the foreclosure. In the case of the execution of a power of sale, on the other hand, the mortgagee, having sold, is still accountable to his mortgagor for the proceeds of the sale, and, after satisfying his own claim and costs, must hand over the balance to his debtor. It is plain that this constitutes a vital point of distinction. The doctrine of foreclosure is a standing menace to the mortgagor, and requires to be guarded and hedged in the strictest possible manner in its exercise; and accordingly we find that Courts of Equity have ever been assiduous to protect the rights of the mortgagor and at least insure to

(a) See *ante*, Vol. XIII. p. 41, where, referring to the power of sale in *Clark v. Harvey*, Mr. Galt says: "The effect of such a power would be simply to efface the right which Courts of Equity have consistently upheld for some centuries past."

him the amplest possible notice when this harsh remedy is proposed to be put in force. It is apparent that under a foreclosure it is possible for a mortgagee to obtain an unconscionable advantage over his mortgagor, and by reason of a comparatively small claim, to entirely deprive the latter of a valuable estate. In the case of a power of sale on the other hand, one does not readily see how such an advantage is to be obtained. Anything over and above the amount of the mortgagee's claim and costs he must return to the mortgagor; and any attempt to make an improper use of the power, as by making a merely colourable sale, with a view to acquiring the property himself (b), or adopting any fraudulent device for the purpose of deterring bidders, will be keenly scrutinized and promptly checked by the Court, and that quite irrespective of the question as to whether the power is one which requires or does not require notice (c).

We do not understand Mr. Galt to say that powers of sale without notice are absolutely void, in the sense, for instance, in which a power having for its object the crea-

(b) *Robertson v. Norris*, 1 Giff. 421; 4 Jur. N. S. 155; affirmed *Ib.* 443; *Davey v. Durrant*, 1 DeG. & Jo. 535; 9 H. L. C. 192.

(c) As showing generally the jealous scrutiny which Courts of Equity will exercise over the enforcement of powers of sale, see *Matthie v. Edwards*, 2 Coll. 465; *Adams v. Scott*, 7 W. R. 213. Where made for a collateral purpose, the sale has been set aside as oppressive and irregular. A collusive sale and conveyance by the purchaser to the mortgagee do not bind the mortgagor: *Robertson v. Norris*, *Supra*; see *Davey v. Durrant*, *Supra*; *Jenkins v. Jones*, 2 Jur. N. S. 99; see *Hosken v. Sincock*, 11 Jur. N. S. 477; *Rhodes v. Buckland*, 16 Beav. 212; *Cotterell v. Srtatton*, 8 Ch. 304; *Whitworth v. Rhodes*, 20 L. J. Chy. 105; *Cockrell v. Bacon*, 16 Beav. 158; *Cockburn v. Edwards*, L. R. 18 Ch. D. 449; *Pooley's Trustee v. Whetham*, L. R. 33 Ch. D. 111; *Falkner v. Eq. Rev. Soc'y.*, 4 Drew. 355; *Richmond v. Evans*, 8 Gr. 508. See also *Astwood v. Cobbold*, 6 R. June 55, and the editorial review thereof, C. L. T. October '94. As to the obligation of the mortgagee to obtain the best price, see *Davey v. Durrant*, *Supra*; *Marriot v. Anchor Ince. Co.*, 7 Jur. N. S. 155; 2 Giff. 457; *Harper v. Hayes*, 2 Giff. 210; reversed, 2 DeG. F. & Jo. 542; *Ferrand v. Clay*, 1 Jur. 165; *Orme v. Wright*, 3 Jur. 19, 972; *Thurlow v. Mackeson*, L. R. 4 Q. B. 97; Sug. V. & P. 65, Ed. 14; Dart. V. & P 67, Ed. 5; *National Bank of Australasia v. United, &c., Co.*, 4 App. Cas. 391. An action will lie at the suit of the mortgagor against the mortgagee for unreasonable exercise of the power: *Brighty v. Norton*, 11 W. R. 167; *Rogers v. Mutton*, 31 L. J. Ex. 275; *Toms v. Wilson*, 11 W. R. 117. If the mortgagee insists on exercising the power of sale unless paid expenses with which the mortgagor is not chargeable, the mortgagor may pay him such expenses and recover them back in an action for money had and received: *Close v. Phipps*, 7 Man. & G. 586.

tion of a perpetuity, or a general power of appointment engrafted on a covenant to stand seised would be void. If we understand him aright, Mr. Galt claims for those powers a peculiar—perhaps somewhat unique—position, with regard to their validity. His statement of his conclusion is as follows: “Whatever protection the courts might extend to mortgagees, who, notwithstanding a power of sale without notice, yet gave the usual notice, there seems to be little doubt that the exercise of such a power according to its tenor would, in the absence of statutory enactment, be an absolutely void proceeding” (*d*). It would seem then, if we are right in attaching this meaning to the qualifying words “the exercise of such a power according to its tenor,” that Mr. Galt’s opinion is that powers of sale without notice are in themselves neither valid nor void, but are “things indifferent,” that their validity or the reverse depends entirely on the manner in which they are exercised, that if reasonable notice is given the power becomes good, but if no notice is given, in other words, if the power is exercised according to its tenor, it is hopelessly bad. The subject strikes us as peculiarly one which cannot be fairly discussed without keeping very fairly in view the fact that powers of sale have a distinctive history of their own.

Originally mortgages were construed by Courts of Common Law strictly according to their tenor, so that on default made, the estate became absolute in the mortgagee (*e*). To Courts of Equity founded on the principles of the civil law this seemed an unnecessarily harsh consequence of the debtor’s neglect, and in course of time, those courts gave practical expression to their views in this respect by introducing new rights on the part of the mortgagor.

It is impossible to assign the exact date at which the equity of redemption as a distinct right on the part of the mortgagor sprang into existence. It is clear that it

(*d*) *Ante*, Vol. 13, p. 45.

(*e*) Co. Litt. 210; 5 Co. 96, 115.

was the creation of the Court of Equity, which regarded the forfeiture of the estate at law, on breach of the condition, as in the nature of a penalty, and so a proper subject for its remedial interposition. It seems clear also that the doctrine was first mooted towards the end of the reign of Queen Elizabeth, as in two cases (*f*) decided about that time, there was apparently no idea in the minds of the parties of the existence of any remedy of the kind; whereas in a case decided somewhat later in the same reign (*g*) the remedy was granted. Mr. Coote thinks the right in question must, shortly after this, have been generally recognized and cites a case in the first year of Charles I. (*h*), in which the doctrine is fully admitted. It is his opinion that the reign of James the First, which saw the Courts of Equity established in power, is also the period of the full recognition of the doctrine of the equity of redemption. The introduction of this novel doctrine met with the most determined opposition on the part of common law judges, and very shortly after its establishment, Courts of Equity found it necessary, in order to prevent evasion by the mortgagees, to decide definitely that no agreement of the mortgagor, made at the time of the loan, purporting to preclude himself from the benefit of this equitable right, should be of any validity, and the maxim, "once a mortgage always a mortgage," became shortly thereafter firmly established—though it may be observed in passing that even that rule has been relaxed upon occasion (*i*).

It was inevitable that the establishment of the doctrine of the equity of redemption, entailing the necessity of tardy and cumbrous foreclosure proceedings in case of default, should lead, at length, to efforts on the part of conveyancers, to introduce some simpler and more

(*f*) *Wade's Case*, 5 Co. 115, and *Goodall's Case*, 5 Co. 96.

(*g*) *Langford v. Barnard*, Tothill, 134.

(*h*) *Emanuel College v. Evans*, 1 Rep. in Ch. 10.

(*i*) See *Bonham v. Newcomb*, 2 Vent. 364; S. C. 1 Eq. Ca. Ab. 312; Cas. Ch. 58; 2 Freem. 67; 1 Vern. 214, 232.

speedy method of procedure. A power of sale enabling the mortgagee, on default, to take the matter into his own hands, and without more ado to sell the land and repay himself out of the proceeds was the natural and obvious expedient, and was, ere long, pretty generally adopted. It was to be expected, moreover, that the equity judges, having striven so hard to establish the doctrine, should be prepared to go great lengths for the protection of their bantling. Accordingly, when powers of sale first made their appearance, we find those judges entrenched behind such positions as "once a mortgage, always a mortgage," and kindred equitable doctrines, flouting and discrediting such powers upon every occasion. For a time the powers had but a sorry life of it. Their struggle for existence continued for a long series of years with varying success, but culminated eventually in their signal triumph, and universal recognition. The time occupied by this contest marks a transition period in the attitude of equity judges towards powers of sale. A glance at certain of the cases decided during that period will be found to throw very instructive side-lights upon the question now under discussion.

In the case of *Croft v. Powell*, decided in the beginning of the 18th century, a power of sale was flatly submitted to the equity judges for adjudication as to its validity, and was by them as flatly repudiated, the mortgagor being let in to redeem several years after the exercise of the power. This decision proceeded upon the strength of the maxim, "once a mortgage, always a mortgage." In a case decided about one hundred years later (*j*), Lord Kenyon, C.J., remarks: "In mortgage deeds there is sometimes introduced a clause that the mortgagee may repay himself by sale of the mortgaged premises, without the concurrence of the mortgagor, but a Court of Equity would, I believe, control the exercise of that power." In *Corder v. Morgan* (*k*), decided in

(*j*) *R. v. Edington*, 1 East. 238 (1801).

(*k*) 18 Ves. 344.

1811, the validity of a power of sale was expressly affirmed, and the concurrence of the mortgagor in its exercise held to be unnecessary. In *Roberts v. Bozon* (*l*), decided a quarter of a century later, Lord Eldon says: "This is an extremely strong clause, but perhaps it may be one of the many new improvements in conveyancing which make conveyancing so different from what it was when I was in practice. . . . Upon the whole, I must say that this deed seems to me of a very extraordinary kind, and that there are clauses in it upon which it would be difficult to induce a Court of Equity to act." In *Ashton v. Corrigan* (*m*) V. C. Sir John Wickson, after expressing doubt, made a decree for the specific performance of a contract for the execution of a mortgage containing a power of sale, referring to Seton on Decrees, 3rd ed. 148, 443. In *Hermann v. Hodges* (*n*) Lord Selborne had no hesitation in making a similar decree. The complete favour into which these powers were ultimately received after a period of doubt (*o*) is evidenced by the following quotations: In *Bridges v. Longman* (*p*) Sir John Romilly says: "Such a power is incident to the power to mortgage unless expressly excluded"; and see *Cook v. Dawson* (*q*). And in *In re Chawner's Will* (*r*), Vice-Chancellor Malins says: "I am of opinion that a power of sale is a necessary incident to a mortgage, &c."

Is it not apparent from the foregoing retrospect that the discussion introduced to-day by Mr. Galt's paper, at all events, in so far as the same is based upon the first of the two grounds therein assigned, is merely another

(*l*) Kent's Comm. VI. p. 147.

(*m*) L. R. 13 Eq. 76 (1871).

(*n*) L. R. 16 Eq. 18 (1872).

(*o*) *McKay v. Reid*, 1 Ch. Ch. 208 (1864); *Clarke v. The Royal Panopticon*, 3 Jur. N.S. 178 (1857).

(*p*) 24 Beav. 27.

(*q*) 29 Beav. 123.

(*r*) L. R. 8 Eq. 570 (1869).

phase of a controversy which has long ago run its course and been laid to rest?

The ground upon which the power of sale was rejected in *Croft v. Powell*, *supra*, was, that it infringed the rule "once a mortgage, always a mortgage," and unduly fettered the equity of redemption, the identical ground now assigned by Mr. Galt for the rejection of powers of sale without notice.

Mr. Galt's reference to *Toomes v. Conset* (*), a case on which he relies largely, is, perhaps, not altogether felicitous. At the time *Coomes v. Conset* was decided, no power of sale (whether with or without notice) in a mortgage had ever been recognized in Courts of Equity. The cases of *Corder v. Morgan*, *supra*, and *Clay v. Sharpe* (†), were the first cases to uphold such powers, and these two last mentioned cases were not decided till some fifty years later than *Toomes v. Conset*. Prior to the decision of these two cases powers of sale of whatever description in mortgages had been slaughtered relentlessly by the equity judges whenever met with on the very grounds set out in *Toomes v. Conset*. In what position, then, is Mr. Galt to adduce as a fatal argument against powers of sale without notice a case which, at the time of its decision, was equally fatal to powers of sale with notice?

It seems to us utterly futile to endeavour to dissociate powers of sale with notice from powers of sale without notice in considering the effect of the first of Mr. Galt's grounds as an argument against the validity of the powers impunged by him. We readily admit that the equitable doctrine relied upon is an approved general doctrine of the court at the present day. At the same time, we venture the opinion that, regarded as an argument against the validity of powers of sale without notice, it is absolutely a *brutum fulmen*.

(*) 3 Atk. 261.

(†) 18 Ves. 346.

The scope of Mr. Galt's argument on this head is too wide. If we are to consider a sale under power of sale as tantamount to a foreclosure of the mortgaged property, doubtless a rigid application of the rule in question would invalidate powers of sale without notice; but it would equally invalidate powers of sale with notice, at all events, if, as is invariably the rule at the present day, the stipulated notice be less than the customary period allowed for redemption in a mortgage action. The rule carried out in its entirety means that nothing short of a foreclosure suit, in which the mortgagor is given full notice and allowed the customary period to redeem, shall be suffered to deprive the mortgagor of his estate in the land. It is obvious that all modern powers of sale, whether with or without notice, infringe that rule. It is submitted, therefore, that Mr. Galt's argument, in so far as it is founded on the equitable doctrine in question, carries its own refutation. To us the true view of the matter seems to be that powers of sale are recognized exceptions to the equitable doctrine referred to. We think the history of such powers bears out that position. Doubtless Mr. Galt's arguments, adduced three centuries ago, when the doctrine of the equity of redemption was first established by the equity judges, would have been conceded as soon as uttered. As a matter of fact, they were so adduced and conceded (*Croft v. Powell, supra*). They were as cogent then to condemn powers of sale even with notice, as they are, we submit, impotent now to affect such powers without notice.

Let us inquire how the case stands with regard to the authorities upon the subject. The volume of authority in favour of Mr. Galt's position must be admitted to be exceedingly meagre. As far as we are aware, there is no decision distinctly holding a power of sale without notice to be void.

Perhaps the strongest case in support of the position is *Miller v. Cook* (u), referred to by Mr. Galt. But

(u) L. R. 10 Eq. 641.

that case is certainly not authority for the general proposition contended for. The plaintiff there based his claim to relief on a variety of strong facts, as that the security was reversionary, the interest usurious, that the bargain was an unconscionable one, a flagrant attempt at extortion and a taking of an unfair advantage of the plaintiff's necessities. And the report of the case to our mind sufficiently shows that it was these general equitable grounds that chiefly affected the mind of the court in granting relief, and formed the basis of the judgment, though it is true the learned judge adds, "Besides the other objections to the contract the terms of the power of sale are oppressive and put the plaintiff completely at the mercy of the defendant. The power to sell without any notice to the plaintiff enabled the defendant at any moment to extinguish the right of redemption." This is the only reference throughout the report to the fact that the power of sale was without notice.

The current of authority countenancing powers of sale without notice on the other hand, is both strong and ample. Perhaps one of the strongest arguments in favour of such powers may be derived from the fact that whenever referred to by legal writers, they are invariable treated as stipulations of undoubted validity; a few examples may better indicate our meaning. In Bythewood's work on conveyancing by Jarman (*v*), we find the following: "The power enables the mortgagee to sell the estate at any time after default, and that without the concurrence of the mortgagor, and even without notice to him (unless notice be made a condition, *Hawkins v. Ramsbottom*, 1 Price 138), and operates therefore very materially to abridge the mortgagor's equitable right to redeem, and for that reason the validity of such powers was formerly considered to be doubtful though now firmly established."

(v) 3rd Ed. Vol. 5, p. 101.

In Prideaux' Precedents in Conveyancing (*w*), the following occurs: "If the validity of a sale is made to depend upon notice care must be taken that the notice is complete." In Davidson on Conveyancing (*x*), "it is of great importance to the mortgagee where, as is generally the case, he has to give notice to the mortgagor, that the sale should be valid at all events." In Mr. Armour's work on Titles, 2nd Ed. p. 359, "When the power provides that it may be exercised without notice, no doubt the agreement of the parties will govern," &c., proceeding then to refer to the opposite *dictum* in *Miller v. Cook*, *supra*. And in the same work p. 360: "A preferable mode of framing the power is to make it operative without notice, and add a covenant by the mortgagee not to exercise the power until he has given notice; or to provide that if default is made for a period longer than the period of default for which sale may be had on notice, then that the power may be exercised without notice" (*y*). In Davidson on Conveyancing (*z*), it is said: "In a recent case" (*Kershaw v. Kalow*, 1 Jur. N. S. 974) "the court refused to stop an intended sale by a mortgagee on the ground of the unnecessary stringency of the conditions, and a sale made under a power to a purchaser acting *bona fide* will not be set aside by reason of the power having been harshly exercised (*a*); and at p. 78 of the same work, "in *Pritchard v. Wilson*, 3 N. R. 350, 10 Jur. N. S. 330, in which the mortgagees covenanted not to sell without three months' notice, and there was a clause protecting purchasers from enquiry, and declaring it to be the intention that the covenant should so operate as to give the mortgagor a right only to an action for damages against the mortgagees, it was held that the proviso

(*w*) 9th Ed. Vol. 1, p. 437.

(*x*) 4th Ed. Vol. 2, Part 2, p. 79.

(*y*) See also *Leith*, R. P. Stat. 873, 424 n, to the same effect.

(*z*) 4th Ed., Vol. 2, Pt. 2, at p. 77.

(*a*) See *Matthie v. Edwards*, 11 Jur. 761.

took away the jurisdiction of the Court of Chancery to grant an injunction against the exercise of the power without notice" (b). It is true "that a clause discharging a purchaser from ascertaining whether proper notice has been given, does not enable a purchaser who knows that notice has not been given" to sustain his purchase (c). "But where there is a provision that the purchaser shall not be affected by express notice that no default has been made or notice given, it seems that a good title can be made to a purchaser though the circumstances render it obvious that the proper notice has not been given and though the mortgagee may be liable for selling contrary to the contract" (d).

When it is considered that the power of sale meeting with most general approval is one which assumes the form of an absolute substantive power to sell (without any provision for notice), and a subsequent separate covenant that no sale shall take place without notice being given, as distinguished from a power of sale which only arises after the giving of certain notice, what stronger authority can we have for the validity of a power of sale without notice than the last mentioned case?

As to the line of Canadian Cases upon the subject, *British Canadian v. Ray, &c.*, they and Mr. Galt's comments thereon have already been referred to by Mr. Symons, and we shall not dwell upon them, further than to remark in passing, that we are quite unable to appreciate the process of reasoning whereby anyone reading them could be led to the conclusion either, (1) that the powers of sale in question therein were upheld in each case, because, though not required by the terms of the power, notice had in fact been given, or (2) that the

(b) See also *Grant v. Can. Life Ass'ce Co.*, 29 Gr. 256.

(c) *Parkinson v. Hanbury*, 1 Dr. & Sm. 143; 2 De G. J. & S. 450; L. R. 2 H. L. 1; *Forster v. Hoggart*, 15 Q. B. 155.

(d) *Ford v. Healy*, 8 Jur. N. S. 1116.

learned judges only refrained from condemning such powers because none of the Counsel were astute enough to raise the objection that powers of sale without notice are of no avail in Equity. We confess that when Mr. Justice Street in Ray's case says, "A power to sell without any notice after a certain period of default is as good as one which requires a notice to be given," we prefer to understand him as meaning simply what he says, and not as merely hanging out false lights to confuse any unfortunate practitioner who may endeavour to ascertain the state of the law upon the subject from the decided cases. To us the cases in question seem to afford the strongest possible authority for the validity of powers of sale without notice.

The case of *Grant v. Can. Life Ass'ce. Co.*, *supra*, too would seem to us deserving of mention among the Canadian cases on the subject, but we do not find it referred to in Mr. Galt's article. The headnote is, "One of the stipulations of a mortgage was Provided that the mortgagees, on default of payment for three months, may enter on and lease or sell the said lands without notice; and the mortgagees covenant with the mortgagors that no sale or lease of the said lands shall be made or granted by them until such time as one month's notice in writing shall have been given to the mortgagors. Held, (per Proudfoot, V.C.), that the mortgagees could sell at any time without notice, after default for three months, and the purchaser would take a good title."

A notice had been served in the case running concurrently with the period of default.

Mr. Galt at p. 40 of Vol. 13, *ante*, referring to the question of the validity of powers of sale without notice when "exercised according to their tenor," says: "This question has not been answered as we have endeavoured to show by any of the cases in our own Courts." Apparently both Mr. Galt and Mr. Symons have overlooked a comparatively recent case in our own Court, which seems

to have a very direct bearing on the point in question. We refer to the case of *Chatfield v. Cunningham* (e), which affirms in a most unequivocal manner the validity of a power of sale without notice. In fact such a power there formed the sole salvation of the defendants, the one boat which served to carry them over the tempestuous sea of litigation to the haven of security ultimately attained by them. Street, J., was, in that case also, the judge who upheld the validity of the power, Falconbridge, J., concurring. The power of sale in question was in the following words: "Provided that the said mortgagees may, on default of payment for one month, &c., *without notice*, enter on and lease or sell the said lands," and the learned judge, in reciting the power, puts the words "without notice" in italics. The exercise of this power was by private sale, and it is noteworthy that, though the validity of the sale is impeached, it is solely on the ground of want of proper public advertisement and of the gross inadequacy of the price realized, the learned counsel for the plaintiff (careful and able counsel too), not even raising the point that a power of sale without notice is of no validity in any event. It seems to us this case might well be thought to clinch the matter, if indeed it required clinching.

We find ourselves somewhat at a loss to understand what Mr. Galt's position really is with reference to the various Canadian cases cited and commented on by him; he seems to us rather to blow both hot and cold in that connection. At one time (f) he seems to say that the fact of notice of sale having been given in these cases forms the ground of decision. His words are, "This may not seem to be a wholly satisfactory ground to assign as the basis of these decisions, for in none of them is any great weight attached to the fact that notice was given; but it is, for reasons which we will refer to later on, the only ground, as we submit, upon which they can be

(e) 23 O. R. 153.

(f) 13 C. L. T. pp, 39 & 40.

supported." And again (*g*) commenting on Mr. Symons' remark that it was not discoverable from the report of the case of *Barry v. Anderson* (*h*), that any notice of sale had been given: "A reporter would indeed shew rash enthusiasm in detailing facts upon which neither counsel nor court relied."

From these apparently contradictory statements, we are left in doubt as to whether Mr. Galt means to say that the court did or did not rely on the fact that notices had been given. Nor do we think Mr. Galt's reference to the the cases discussed in *DeColyar on Guarantees* in the comments upon *Fitzgerald v. Dressler* (*i*), aid Mr. Galt materially in his argument. *Fitzgerald v. Dressler* was a case upon the law of guarantees, admittedly a subject of much difficulty and complication. The judgment in that case in effect formulated a general rule upon a branch of that subject, which it was thought rendered reconcilable a number of previous decisions, theretofore apparently at variance, which decisions had been based by the judges arriving thereat on somewhat different grounds. No doubt, cases will always continue to occur where, on difficult points of law, judicial opinion will differ as to which of two propositions is the more satisfactory to assign as the ground of a given judgment. But that is a very different thing from saying that judges frequently arrive at correct conclusions without being able to assign the definite ground upon which their judgment proceeded.

Having indicated the strong current of authority to be contended with in impeaching the powers of sale under consideration, let us advert for a moment to the argument drawn by Mr. Galt from our Ontario statutes. And we may remark in that connection that Mr. Galt seems to have strangely misconceived the in-

(*g*) 14 C. L. T. p. 50.

(*h*) 18 App. R. 247.

(*i*) 7 C. B. 374.

tent and effect of the Act cited by him at p. 45. His argument is based upon the wording of 53 Vict. cap. 27, which provides that when a mortgage under the Short Forms Act contains a power of sale without notice, the mortgagee may take proceedings to sell under, and have the benefit of the provisions of, part II. of R. S. O. *had not contained a power of sale.*" The italics are cap. 102, "as fully and effectually as if the mortgage copied from the article in question, and the argument adduced from the italicized words is there stated as follows: "If powers of sale without notice are valid stipulations, it is difficult to imagine why the Act of 1890 was passed, enabling the mortgagee to proceed as if the mortgage had not contained a power of sale. But if the Legislature regards these powers as merely void, the Act is a useful one, and provides a reasonable protection to both mortgagors and mortgagees." We think the use by the Legislature of the words in question is susceptible of a much simpler explanation. Statutory powers of sale and insurance were first introduced into mortgages in Ontario by 42 Vict. cap. 20, an Act which is now embodied in R. S. O. cap. 102. These statutory powers were by the Act in question confined strictly to a certain class of mortgages, it being provided in the case of the power of sale that "so much of this Act as provides for a power to sell shall not apply in the case of a deed which contains a power of sale," and this restriction is continued in the Revised Statute. The statute in question besides introducing the power of sale, made various provisions relating to its exercise, some of which might in certain cases be very beneficial to parties taking proceedings under it.

Subsequently, by 51 Vict. cap. 15, the benefit of the Act was extended to a second class of mortgages, it being provided by sec. 4 that whenever a mortgage under the Short Forms Act contains a power of sale in the Form No. 14, column 1 of Schedule B to that Act, the mortgagee, in lieu of taking the proceedings pro-

vided for by the said Form No. 14, column 2, may take proceedings under and have the benefit of the Act above referred to (R. S. O. cap. 102, part 2) on certain conditions.

Upon the passing of this Act the following state of affairs had been brought about by the Legislature with respect to the statutory power of sale: The benefit of that power and the proceedings under it had been annexed to (1), Mortgages executed since 11th March, 1879, which contained no power of sale; (2), Mortgages made in pursuance of the Act respecting Short Forms of Mortgages containing a power of sale in the form prescribed by that Act. It will be seen that two classes cover the great majority of mortgages in use within the Province of Ontario.

But there still remained another class, viz., mortgages purporting to be made under the Short Forms Act, but containing a power of sale without notice. There would seem to be no reason why such mortgages should not, equally with those before mentioned, participate in the benefit of the Act; and, accordingly, by 53 Vict. cap. 27, the Legislature set itself to extend to these mortgages also the benefits attaching to the statutory power. It is upon the words used by the Legislature in carrying out their intention in this respect, that the learned writer founds his argument. The words used in the last mentioned Act are: "Whenever a mortgage, purporting to be made in pursuance of The Act Respecting Short Forms of Mortgages . . . contains a power of sale which provides for a sale without notice, the mortgagee, his heirs, executors, administrators or assigns may take proceedings to sell under, and sell and have the benefit of the provisions of Part II. of The Act Respecting Mortgages of Real Estate as fully and effectually as if the mortgage had not contained a power of sale." But surely no such argument can be deduced from these words. It must be borne in mind that when the statu-

tory power of sale was first introduced into mortgages in this province it was annexed to such mortgages only as did not contain a power of sale (R. S. O. cap. 102, sec. 29). That being the case, is it not merely a natural and appropriate method of expressing their meaning for the Legislature, when they desire to extend the benefit of the statutory power to another class of mortgages, to say that the power shall apply to such class as fully and effectually as if the mortgage had not contained a power of sale? It is merely another way of saying "as if the class of mortgages in question had fallen within the purview of the original Act."

While upon this branch of the subject, we may appropriately refer to a certain other provision of the Legislature which appears to have escaped the notice of the learned writer. The statement that, so far from discrediting powers of sale without notice, the Legislature has actually lent its express countenance to them, would, in the light of what has gone before, no doubt, seem a bold proposition. Yet, we venture to think, one could hardly be accused of putting the case too strongly were he to hazard that statement. Sec. 21 of R. S. O. c. 102, reads as follows: "When a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that such power has been improperly or irregularly exercised, or that no such notice as aforesaid has been given, but any person damaged by any such unauthorized, improper or irregular exercise of such power shall have his remedy against the person selling." Suppose the case of a mortgagee entitled to avail himself of the statutory power effecting a sale under his mortgage in "professed exercise" of that power, but omitting to give any notice of sale. Is it not clear that the mortgagor's estate is gone forever? It will be seen that the Legislature, so far from feeling embarrassed by the traditional sentiment of veneration

for the supposed inviolable estate of the mortgagor, has gone a step further even than the inventor of powers of sale without notice, inasmuch as it has approbated a sale without notice under a power which required notice to be given. It will be observed also that under the strict wording of the Act there would be apparently nothing to prevent a sale under the power in question after one day's default, and without notice, being held perfectly valid so long as it was effected in professed exercise of the power. The fact seems to be that neither the Legislature nor the Courts of the present day regard the equity of redemption as an estate to be preserved at all hazards in its pristine inviolability.

F. P. BETTS.

LONDON, CANADA.

(To be concluded.)

EDITORIAL REVIEW.

The Late Premier.

The death of Sir John Thompson, Premier of Canada, under such tragic circumstances, is a matter of deep regret to the whole of Canada, and has been made a common cause of mourning over the Empire. Not many minutes after being sworn in as a member of the Privy Council he expired suddenly while sitting at luncheon at Windsor Castle.

It has fallen to the lot of few men to acquire distinction in so short a period of public service and at such an early age as did the late premier. Sir John Macdonald's public life was a long and arduous one. Sir John Thompson's, short, but brilliant. It was more in a judicial capacity than as a statesman that his best qualities were called out. His speeches in Parliament were few, and while they have elsewhere been greatly lauded, we think that their chief or rather their only characteristics were the calm and judicial tone which pervaded them, the apparent sincerity and conscientiousness with which they delivered. This is not exactly what is expected from a parliamentarian and a leader, which at the present day unfortunately means a party politician. As a writer in the *Nineteenth Century* for December says, no one expects a single vote to be changed by speeches in Parliament, but excuses and justification have to be made for 'the party.'

Let it not be thought, however, that we condemn the late premier for his failure as a party politician. On the contrary, even if the calm and judicial tone, the sincere and industrious collection and collation of facts, do not

for the supposed inviolable estate of the mortgagor, has gone a step further even than the inventor of powers of sale without notice, inasmuch as it has approbated a sale without notice under a power which required notice to be given. It will be observed also that under the strict wording of the Act there would be apparently nothing to prevent a sale under the power in question after one day's default, and without notice, being held perfectly valid so long as it was effected in professed exercise of the power. The fact seems to be that neither the Legislature nor the Courts of the present day regard the equity of redemption as an estate to be preserved at all hazards in its pristine inviolability.

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LONDON, CANADA.

(To be concluded.)

The following information was obtained from the records of the
 Department of the Interior, Bureau of Land Management, at
 Washington, D. C., on the date of the hearing, to-wit:
 The land in question is situated in the County of [redacted]
 State of [redacted] and is more particularly described as
 follows: [redacted]
 The land is owned by [redacted]
 and is subject to the following conditions: [redacted]
 The land is situated in the [redacted] [redacted]
 and is more particularly described as follows: [redacted]
 The land is owned by [redacted]
 and is subject to the following conditions: [redacted]
 The land is situated in the [redacted] [redacted]
 and is more particularly described as follows: [redacted]
 The land is owned by [redacted]
 and is subject to the following conditions: [redacted]

It is only with regard to constitutional cases that Canada differs from Australia; and if there is any reason for a Colonial Judge to be added to the Board, it is on account of the constitutional cases which go to the Board from Canada. We cannot see, however, that a Canadian Judge will decide a case any better on account of his sitting in London than he will in Canada. And we should, under any circumstances, be loth to think that the presence of one member should influence the Board, after a variety of judicial opinion here.

Notwithstanding what we have said we should be glad to see such an appointment, not because it would be of any practical value to us, but because we are ambitious of Imperial distinctions. Canada is very jealous of her position in the Empire, very anxious to draw closer to the mother country, and very proud of the men she produces.

Comparative Legislation.

Mr. Ilbert recently read a paper on the Imperial Institute advocating the collecting and comparison of statutes passed throughout the British Empire and in the United States of America. Mr. Herbert Spencer goes further, and suggests the tabulation of English statute laws, with the reason for the enactment of each law, the effect produced, the duration; and if repealed, the reason for the repeal.

We doubt whether such a feat could be accomplished. Even in our young Province it would be difficult to account for the origin of many statutes. Following the legislation from year to year it is difficult to find the reasons for more than half the enactments. Many of them arise from solitary cases, no public need for them being known. It is true that a commission could ascertain the sources of these Acts, but in such a vast work as that suggested one would expect to find some better reason for a legislative enactment than that "John Doe was aggrieved by a decision, and having the ear of the governing party procured an Act to amend the law." Yet such cases exist.

If some one, however, would undertake to expound the meaning of some of our statutes when passed, he would deserve the thanks of the community.

Conditional Notice to Quit.

A recent case, *Bury v. Thompson*, 11 Times L. R. 118 raises again the question whether a notice to quit or determine a tenancy is good, if it is accompanied by a proposal that the tenant shall remain on other terms. The leading term was *Doe v. Jackson*, Doug. 175, where Lord Mansfield laid down a rule that has been understood for many years to mean that an alternative or optional course proposed in the notice renders it bad. In *Ahearn v. Bellman*, 2 Ex. D. 201, this rule was apparently departed from; and this case was followed in *Bury v. Thompson*.

All agree that the notice must be certain and ambiguous, that it must clearly intimate the intention to put an end to tenancy; but there is an apparent difference of opinion as to whether a proposal for new terms vitiates the notice. In *Ahearn v. Bellman* it is worthy of notice that Lord Justice Brett dissented in an able judgment which is very convincing—until one reads the others.

After all it amounts to a question of construction; and thus one of the greatest dangers is placed in the path of the person giving the notice. What may seem perfectly clear to one person, may appear just as clearly to another to bear the opposite signification. It may be worth while to compare the notices given in the three cases.

In *Doe v. Jackson*, the notice ran:—"I desire you to quit the possession at Lady-day next, etc., or I shall insist upon double rents for the same."

In *Ahearn v. Bellman*:—"I hereby give you notice to quit. . . . And I hereby give you further notice that should you retain possession of the premises after the date before mentioned, the annual rental of the premises now held by you from me will be 160*l*, payable quarterly in advance."

In *Bury v. Thompson* :—" I have looked into my lease and find that the first seven years will expire on December 25, 1894. [The lease, for 21 years, was determinable on notice.] I have made inquiries and find the rent very high, as compared with the rents of other houses, as I think £50 too high, and I shall not be able to stop unless some reduction is made. I desire to give ample time to give ample time to consider what course to take," &c.

It will be noticed that, in the first case, the notice to quit which was absolute in terms was followed by a notice of what the legal consequences would be if it was not obeyed. The landlord would insist upon his penalty, which he interpreted to be double rent but which is in reality double the annual value. In the other two cases an option is given to remain on if terms which the landlord offered are accepted. This is not as far as one can see a certain and unambiguous notice to quit. If the sentences are transposed (and this is a perfectly legitimate test) they amount to this :—" If you desire to stay on in the demised premises you must pay me a higher rent ; if you do not agree to pay me such rent then you must go." The notice is not absolute. The intention of the landlord is not that the tenant shall leave unless negotiations fail. And with great respect for the Courts which hold otherwise, we should think that on failure of negotiations there should be an absolute notice given.

BOOK REVIEWS.

Canadian Appeals. A complete collection of Canadian cases taken on appeal to the Judicial Committee of the Privy Council, and of reported cases carried to the Supreme Court of Canada, and the Courts of appeal in Upper Canada and Ontario, up to March 1st, 1894, showing the judicial history of all such cases. By C. H. MASTERS, B. A., Barrister; Assistant Reporter of the Supreme Court of Canada. Toronto: The Carswell Co., 1894.

The design of this work is to give the history of a case as it proceeds through the different appeals. By looking at the alphabetical list of cases the result will be found on appeal, that is, whether the judgment in the Court below was affirmed or reversed with a reference to the report and the ultimate decision can be ascertained by a moment's reading. The book will be very useful for this purpose. We think, however, that its scheme might be improved on and the compiler's labours at the same time lightened. For instance, Mr. Masters has taken the pains to classify the Ontario cases by the courts in which they originated. This is not essential. A case is known by its name, not the court in which it is. One alphabetical list of cases with columns for the Courts, reference to report, result in Court of Appeal, Supreme Court, and Judicial Committee, would serve all the purposes of the work and save the trouble and expense of repeating cases. We would also suggest the indexing by names of defendants as well as by names

of plaintiffs. We do not notice *Lenoir v. Ritchie* in the index, which was an appeal from Nova Scotia on the right of the Province to appoint Queen's Counsel.

An Analysis of the Eleventh Edition of Snell's Principles of Equity, with notes thereon. By E. E. BLYTH, LL. D., B. A., (Lond.), Solicitor, etc. Fifth edition. London: Stevens & Haynes, 1894.

As a condensation of the text of Snell, this analysis is useful for students in reviewing their work, after a perusal of the book itself. Its usefulness is proved by the number of editions that it has run through.

THE CANADIAN LAW TIMES.

FEBRUARY, 1895.

THE LIBEL ACT OF 1894.

AMONGST the public Acts of the last session of the Ontario legislature was one amending the law of libel, and which is to be cited as "*The Law of Libel Act, 1894.*" It is to be read with, and to form part of, the Act respecting actions of Libel and Slander (a) and the Law of Slander Amendment Act, 1889 (b). The bill, which was in charge of Mr. Harcourt, the provincial treasurer, was introduced and read a first time on the 21st of March, 1894. It was read a second time on the 10th of April, and a third time on the 19th of April. It was assented to and became law on the 5th of May, 1894. The principal discussion took place on the second reading, when section 4 was amended by adding the second sentence in the section; section 6 by adding subsection 2; and section 7 by adding the latter portion of the section providing for an appeal as to security for costs from a local judge to a judge of the High Court. Section 10 was added on the third reading. Although evoking keen opposition on the part of one or two lawyers in the House, the bill as a whole received the support of the leading men on both sides, and was passed through its different stages without much difficulty. "The Hectors of the long robe," so it was said at the time, "were more than matched by the Achilles of the pen who had seats

(a) R. S. O. cap. 57.

(b) 52 Vict. cap. 14.

in the Assembly." The bill as finally passed was regarded by the journalists of the country as exceedingly parsimonious ; but its place in a Lenten bill of fare may account for its legislative leanness.

The new Act, which has really improved the law, was the outcome of an agitation in the newspaper press against certain matters of procedure and practice in libel actions, which, it was said, hampered newspapers in the discharge of their functions and exposed them to vexatious litigation. The grievances of the publishers, besides being ventilated in vigorous leading articles, were formulated in petitions to the legislature. In these they complained of being seriously handicapped in the prosecution of their business as journalists, and as purveyors of news, by the existing libel law. A large number of actions for damages, purely of a speculative character, were alleged to have been entered, or threatened, against newspapers during the past year. The petitioners sought no immunity for publications expressly malicious, and were quite content that these should be rigorously dealt with ; but they wished a salutary check imposed on trumpery actions to which there might be a good defence on the merits, but which were instituted for the purpose of extorting money from publishers who were unwilling to incur the annoyance and expense of litigation. Some relief was also sought in the case of "secondary libels," namely, defamatory matter copied from other newspapers, or received from news agencies, with little or no chance of verification beforehand. The nature of the relief asked for, and that which was actually granted, will be indicated in a subsequent part of this article. Amendments as to the privilege given to reports of public meetings and proceedings before judicial tribunals, as to conferring the benefits of the Act on monthly trade papers, and as to the procedure for obtaining security for costs, were also suggested to the law-makers of the province, who were reminded of the exceptional position occupied by the press and the public nature of its duties.

Considering the reasonableness of the amendments prayed for, the response to this appeal to the legislature was feeble and disappointing. Every change proposed, with one or two exceptions, was supported by precedent or authority, and, as to the exceptions, cogent reasons were urged in favour of some sort of remedial legislation. The House, however, was sitting on the ragged edge of dissolution, and was in no humour, apparently, to deal to any great extent with the niceties of the case. The new Act might be very much better than it is, but it is on safe lines and in the right direction. Experience has amply justified the changes which have been made, and will still further improve the law, which, in its various amendments from time to time, has been largely the outgrowth of public opinion.

We propose to deal with the sections of the new Act *seriatim*, and more fully and less technically, perhaps, than is usual in these pages. For this reason a few cases, which illustrate some of the sections, are set out almost *in extenso*.

As to the first section naming the Act it may be observed, that the present is the third statute of the kind which has been passed within twelve years. The first amendments of the old law, as it had existed for a long period of time, were contained in "The Newspaper Libel Act, 1882," which was passed on the tenth of March of that year. It defined the term "newspaper," and gave to fair reports of public meetings the protection of a qualified privilege. Five years later, on the 23rd of April, 1887, the second "Act respecting the Law of Libel" was assented to. It made important changes in the law affecting the press. Notice of complaint was then, for the first time, required as a condition precedent to an action against a newspaper; the damages recoverable were restricted in certain cases; the statutory words "a public meeting" were extended; the reports of proceedings in courts of justice were privileged; greater security for costs was provided for;

and the venue in actions against newspapers was, to a certain extent, limited. In England during the same period, namely, in 1881 and 1888, amendments of the law of libel, more extensive than our own, were enacted. All these changes, both there and here, were promoted by the newspaper press; but, as between the mother country and this province of the Dominion, there is, so far as advanced libel legislation is concerned, a balance in favour of the old land.

Section 2.—This section defines the word “newspaper” as used in the Act. It enacts that “the word ‘newspaper’ shall mean any paper containing public news, intelligence, or occurrences, or any remarks or observations thereon, printed for sale and published in the province of Ontario periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers, and any paper printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.” This definition, or at least one substantially the same, appeared originally in “The Newspaper Libel Act, 1882” (c) and was the first definition by a Canadian statute of the word “newspaper.” It is, as we shall see, defective in not comprising a large and very useful class of publications which are fairly entitled to the protection of the Libel Act, and having regard to its origin and object, is a questionable definition to insert in a modern statute affecting the newspaper press. Pollock, in his Law of Torts, speaks of a similar definition, in the English Libel Act of 1881 as “almost a *reductio ad absurdum* of modern abuses of parliamentary drafting.” The definition is culled from three distinct and separate clauses of schedule A to 6 & 7 Wm. 4, cap. 76, each of which has reference to a distinct class of publications. This Act was repealed by 33-34 Vict. cap. 99, but the definition

(c) 45 Vict. cap. 9.

was subsequently revived in 44-45 Vict. cap. 60, and thence found its way into our own law.

The statute of William follows a series of Acts commencing with 10 Anne, cap. 19, and ending with 60 Geo. III. & 1 Geo. IV., cap. 9, which imposed stamp duties on certain publications designated as "newspapers," and affixed penalties for issuing them without stamps. Under the statute of Anne, for example, the *Spectator* was taxed as a pamphlet, and grievous complaint is made of this by Addison in one of the numbers. The schedule A to 6 & 7 Wm. 4, taken in connection with the enacting part of the statute, was meant to be a legislative declaration of what should be deemed and taken to be "newspapers" within the *stamp laws*. The first clause in the schedule comprised "any paper containing public news, intelligence, or occurrences, printed in any part of the United Kingdom to be dispersed and made public." The second clause comprised "any paper printed in any part of the United Kingdom weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements." The third clause, which was taken, with some alterations, from 60 Geo. III. & 1 Geo. IV., cap. 9, comprised "any paper containing public news, intelligence or occurrences, or any remarks or observations thereon, printed in any part of the United Kingdom for sale, and published periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers," etc. The rest of the clause refers to the size and form of the paper, and the price at which it may be sold. The first clause of the schedule is contained in the first set of Acts, ten in number, prior to 60 Geo. III. & 1 Geo. IV., cap. 9. The second and third clauses, referring to the stated intervals of publication, first appeared in the first section of that statute which was passed in 1819. That was "an Act to subject certain publications to the duties of stamps upon newspapers, and to make other regulations for

restraining the abuses arising from the publication of blasphemous and seditious libels." From the preamble to the Act it fully appears that the interval of twenty-six days, between the publication of the parts or numbers, was adopted for the purpose of restraining the publication of papers "tending to excite hatred and contempt of the Government and constitution of these realms as by law established, and also vilifying our holy religion." These papers, it was recited, were published in great numbers and at small prices, and it was "expedient that the same should be restrained" by the imposition of certain stamp duties from which theretofore they had been free, and which the statute provided for. It is manifest, therefore, that the object of the statute, which first set limits to the time within which those papers should be published, was, firstly, to impose a duty upon a certain class of publications containing comments on the current events of the day in Church and State, and published within the prescribed intervals, but which had not been comprised in any prior enactment under the head of "newspapers;" and, secondly, the repression of those publications as being of a mischievous and dangerous character.

The only reported decision applicable to this section of the Ontario Act is the Attorney General v. Bradbury & Evans (*d*), which had reference to the definition in the statute of William from which our own definition was taken. That was an information charging the defendants, under the Act, with having printed a newspaper on paper not duly stamped; and seeking to recover from them the penalty of £20 imposed by section 17 of the statute. The publication alleged to be a newspaper was entitled "The Household Narrative of Current Events" from the 30th of March to the 26th of April, and related the proceedings in the Houses of Parliament and courts of law, and other events which had occurred during that period, but it was a part or

(*d*) 7 Ex. 96, (1851).

number of a publication published periodically, in parts or numbers, at intervals exceeding twenty-six days. The Court (Pollock, C. B., Platt, B., Martin, B.; *dissentiente* Parke, B.) held that it was not a "newspaper" within the meaning of the Act, and so was not liable to the stamp duty.

The definition in this section has been a good deal criticized, and properly so, on account of its excluding monthly periodicals, and especially monthly trade papers, from the benefits of the Act. The latter are, without exception, highly useful and well conducted publications, and are of infinite service to an increasingly large class of readers. They are devoted to the various manufacturing, mercantile and trade interests of the country, and contain "public news, intelligence, or occurrences," and "remarks or observations thereon," relating to those interests, and also to the current events of the day. They do not harbour "blasphemous and seditious libels"; they do not excite "hatred and contempt of the government," or vilify "our holy religion"; they are neither dangerous nor mischievous, as was the baneful brood of prints at which the penal Act of George was aimed. Except that they are published at intervals "exceeding twenty-six days," they are "newspapers" *de facto*. Why should they not be "newspapers" *de jure*? Public opinion has long since declared that they should be; yet the Ontario legislature has persistently adhered to an effete formula which places them, as compared with other vehicles of intelligence, under the ban of the law. This species of intolerance is indefensible. One of the arguments advanced in its favour is, that articles in monthly publications are usually written with more deliberation than those in ordinary newspapers. *Ergo*, if they are defamatory, they should receive no more comfort than is afforded them at common law. This is very specious reasoning, and the facts are entirely against it. Every journalist knows that many leading articles are prepared with the great-

est care and circumspection, and often long in advance of their appearance in print. The private cabinet of the editor of the *London Times* is said to contain an obituary of every great living Englishman. The judgments in the *Attorney-General v. Bradbury & Evans, supra*, present no such argument. Baron Parke, the very able dissenting judge, thought the defendant's publication contained all the elements of a newspaper, and he so adjudged. Chief Baron Pollock, on the other hand, considered that "a certain infrequency of publication gives to a periodical the character of a chronicle or history, and not that of a newspaper; and however it may afford useful information, as it is not likely successfully to compete with the daily or weekly papers, it has not been rendered liable to the stamp duty. An interval of more than twenty-six days is what, I think, the law has fixed as the criterion—if the interval be twenty-six days or less, it is a newspaper; if it be more, it is a chronicle—and the whole question turns on the distinction between news and history, which I think has been settled by the legislature." Very good, we may add, as to that case and that time, but the times and the criteria have changed since George the Third was king. The whole life of the press has been revolutionized, and the "tax on knowledge," along with the odious penalties by which it was enforced, has been swept away. The number "twenty-six" is at the best purely arbitrary; it no longer marks the line "between news and history"; its *raison d'être* is not even tenable. The origin and object of the penal statute, under which the decision referred to was given, had everything to do with its provisions. Why should an archaic enactment passed for a specific purpose, and to suppress glaring and perilous evils that no longer exist, be imposed on any respectable publication in our time?

These were some of the considerations which influenced a proposal to the legislature at its last session to extend the benefits of section 2 to monthly periodicals

and trade papers. The simple change of "twenty-six days" to "thirty-one days" would have done this, but, fair and reasonable as was the proposal, it was not entertained. When the libel clauses of the Criminal Code were before the Dominion parliament, the attention of the late Minister of Justice, Sir John Thompson, was directed to a similar definition in the bill. He at once recognized the justice of the proposed amendment, and the bill was amended accordingly. We can only hope that, at some future time, the local legislature will follow the precedent set by the Dominion legislature under the guidance of the distinguished jurist who has since passed from the scene.

Section 3.—This section provides for giving evidence of certain facts and circumstances which were previously inadmissible in mitigation of damages. It enacts that, "upon the trial of any action for libel contained in a newspaper, the defendant shall be at liberty to give in evidence, in mitigation of damages, that the plaintiff has already brought actions for, or has recovered damages, or has received, or agreed to receive, compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought."

This section is taken from the English Law of Libel Amendment Act 1888 (*e*). It is confined to actions for libels contained in newspapers, as defined by section 2 of the Act, and has no application to any libel which appears in any other publication, for instance, in a book, monthly periodical or trade paper published at intervals exceeding twenty-six days. These are excluded, unjustly we think, from the benefits of the enactment which is a valuable one to newspapers. The reasons for the enactment, and its practical advantage, so far as newspapers are concerned, will be noticed presently. Meanwhile it may be remarked, perhaps un-

(*e*) 51 & 52 Vict. cap. 64, sec. 4.

necessarily, that the "actions" mentioned in this section, of which evidence may be given, are not actions against the same defendant referred to in the section, but "actions" against some other person. This is obvious from the language of the section, and from what we know of the state of the law prior to the passing of the Act. It always was, and still is, a good defence to an action for libel, that the plaintiff in the action has already brought an action in respect of the same libel against the same defendant in the action, or against a third person with whom the defendant was jointly concerned in the publication of the libel. This defence was and is available, whether the plaintiff succeeded or failed in the previous action. The question is whether the legal liability for publication is joint or several. That is the test. The author of a libel, the printer, editor, publisher and proprietor of the newspaper in which it appears, and any person who sells, gives, or lends, a copy of the newspaper containing it, are each and all liable for its publication, and each or all may be proceeded against by the person defamed. If a defendant in a certain libel action is jointly concerned with a third person in the publication of the libel, it was and is a good plea in that action, and a good defence, if established, that the plaintiff has already brought an action against the third party for the same libel. For instance, where A. the third party against whom the previous action has been brought, is a partner of B., the defendant in a publishing firm, the legal liability is joint, and the fact of the previous action having been brought against A. would be an effectual answer to an action for the same libel against B. (f). If, however, A. should happen to have been the writer of a libellous article, and B. the publisher of the newspaper in which it has appeared, there the legal liability would be several, and a previous action against A., would be no answer to an action against B., and *vice*

(f) *Brinsmead v Harrison*, L. R. 7 C. P. 547.

versa (g). In the latter case, however, under section 3 of the Act of 1894, the previous action against A., would be a partial answer by B., in respect of an action for the same libel against B., because it could be pleaded in mitigation of damages.

In the case of joint liability the defence of a previous action brought and verdict recovered is, of course, still stronger. In *Willcocks v. Howell, et al.* (h) it was held that a recovery of a verdict, in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and all costs, even without judgment being entered, is a bar to an action against the other parties concerned in the same libel.

J. KING.

(g) *Creevy v. Carr*, 7 C. & P. 64 ; *Frescoe v. May*, 2 F. & F. 123 *infra*.

(h) 8 Ont. R. 576.

(*To be continued*).

POWERS OF SALE WITHOUT NOTICE.

(Concluded).

We do not wish to be understood as arguing in favour of the adoption and exercise of the powers of sale without notice. We are quite free to admit that in our view, in fairness to the mortgagor, notice should be given in every case, whether the power do or do not require it, unless some exceptional circumstances exist sufficient to warrant its being dispensed with. We think any mortgagee exercising his power of sale, in an ordinary case, without giving such notice and affording his mortgagor a reasonable opportunity to redeem, would, whatever might be the legal or equitable aspect of his conduct, be undoubtedly guilty of distinct moral turpitude, just as would any person who, having a claim against another, should have recourse to the process of the court, without first giving his debtor fair warning. But moral turpitude unfortunately is too often one of those things at which Equity nods her head. And this leads us to the remark that portions of Mr. Galt's article seem to us to be characterized by a certain laxity of reasoning which, while plausible at first sight, will not bear a close scrutiny, and strikes one as perhaps scarcely intended even by Mr. Galt himself to be taken quite seriously. Take for instance the proposition enunciated on page 40 of Vol. XIII., bearing upon the branch of the subject now under discussion. "On the other hand if a mortgagee is only doing what is fair and reasonable in giving the usual notice, why should he not be held to have done what was unfair and unreasonable if in any case he neglects to give it?" This argument seems to proceed upon the assumption that everything that is unfair and unreasonable will be

relieved against in Equity, a proposition obviously incapable of support. If any reference on the subject is necessary, perhaps the following will suffice:—"A large proportion of natural equity in its widest sense must be left to the conscience of each individual, and cannot be judicially enforced (*j*). There are on the other hand; cases of fraud, accident and trust in which neither courts of law nor of equity presume to grant relief" (*k*).

Again, to speak of powers of sale as being good in law but bad in equity, tends, we think, to no useful purpose; on the contrary, such a mode of expression has a tendency to obscure the subject under discussion. Its effect may be to draw attention from what is the very end and object of such powers. At law, powers of sale in mortgages are mere surplusage. Mortgagees might cheerfully submit to their elision without being the worse of the operation. In the contemplation of Law, the mortgagee is the owner of the mortgaged property; the legal estate is vested in him, and it requires no adventitious aid, whether of powers of sale or otherwise, to enable him to convey it. He can do so fully and effectually by force of his position at any time after default. The object of the power of sale is simply to extinguish an equitable interest. This is expressed by Chief Justice Richards in *Nesbitt v. Rice* (*l*), as follows:—"If the premises were mortgaged in fee to M., there was no power of sale required to transfer the legal estate to J. nor from him to P. There may have been some equitable interest left in the original mortgagor, which would make it desirable to have a power of sale in the mortgage, and to be able to exercise it. But as far as the legal rights of the parties are concerned, which we have to deal with, if the legal estate passed by the mortgage, the person holding that estate could undoubtedly convey it." See also *Kelly v. Imperial L. & I. Co.* (*m*)

(*j*) Taylor Eq. Jur. p. 12.

(*k*) *Ib.* p. 12.

(*l*) 14 C. P. 409.

(*m*) 11 S. C. R. p. 528.

where Mr. Justice Strong says:—"It must however be remembered that the power of sale is the power to sell and convey the equity of redemption only and that the conveyance of the mortgagee for the purpose of carrying out a sale under it operates on the legal estate as a conveyance strictly and not as the execution of a power, from whence it follows that if the equity of redemption is gone by foreclosure or otherwise, the power is also extinguished" (n).

In Mr. Galt's letter of the 5th of January last, occurs the following passage:—"In addition to the reasons above given for the opinion that powers of sale without notice are bad in equity, I would ask Mr. Symons to also consider the following view of the question. Mortgagees with a power of sale are regarded as trustees (Coote's Law of Mortgages, 5th Ed'n. 276) and therefore they are entitled to the protection and liable for the duties of their office, &c. . . . The following extract from a leading authority on the subject will indicate the liability alluded to. A trustee for sale will remember that he is bound by his office to sell the estate under every possible advantage to his *cestuis que trustent*. .

. . . If trustees or those who act by their authority fail in reasonable diligence in inviting competition, or in the management of the sale (as if they contract under circumstances of haste and improvidence, or contrive to advance the interests of one party at the expense of another), they will be personally responsible for the loss to the suffering party, and the court, however correct the conduct of the purchaser, will refuse at his instance to compel the specific performance of the agreement" (Lewin on Trusts, Bl. Ser. 561).

Mr. Galt's argument obviously is: Trustees for sale are subject to the obligations set out in the last preceding sentence. Mortgagees with a power of sale are

(n) And see *Watson v. Marston*, 4 D. M. & G. 230, cited in *Armour on Titles*, 2nd Ed. p. 359.

trustees for sale; therefore, mortgagees with a power of sale are subject to the obligations aforesaid. To this argument we might not unfairly apply Mr. Galt's own words: "This is an argument which will strike different minds with different force; it is plausible, and to anyone who does not choose to look beneath the surface of the matter it is formidable."

To our mind the fallacy of the argument lies in the minor premiss. Without stopping to enquire how far the court will hold mortgagees with a power of sale to the obligations above mentioned, we may say that we scarcely think Mr. Galt's argument places the matter quite fairly before his readers. To some his argument may seem rather ingenious than ingenuous, and in saying this we do not mean for a moment to impute any conscious unfairness of statement to Mr. Galt, but simply to express our conviction that in this instance the ardour of the advocate has blinded the judgment of the critic. Having said as much as he has on the subject of mortgagees with a power of sale being trustees, and, therefore, subject to all the liabilities to which trustees are subject, it behooved him, we think, in order to place the matter with perfect fairness before his readers, to go a step farther and point out that the trusteeship of a mortgagee is recognized to be of the very faintest kind, and that the courts have drawn a very clearly defined distinction between simple mortgagees with a power of sale and trustees for sale, as regards the extent to which the obligations and duties attaching to the latter are obligatory also upon the former.

In the case of *Anonymous* (o) the court clearly recognized that while it is the undoubted duty of a trustee with power of sale to consult the interests of all his *cestui que trustent* and to notify all before proceeding to sell, no such obligation rests upon a bare mortgagee with power of sale without notice, and that while the

(o) 6 Madd. 10.

court would enjoin a trustee who attempted to proceed without notice to his *cestuis que trustent*, they would refuse to interfere against a mortgagee. Mr. Coote in his work on mortgages comments upon this case, and points out that the judgment proceeds upon the distinction that exists between a trustee and a mere mortgagee with power of sale. Time and again courts have evinced their impatience at the styling and treating of mortgagees as trustees, and have flouted arguments sought to be based upon the supposed analogy. In Bythewood & Jarman, Vol. III., 689 (1890), the relationship is expressed as follows: "He," the mortgagee, "is, subject to the purpose of satisfying his own debt, a trustee for the mortgagor." It has been said again that he is a trustee for the mortgagor in respect of any surplus which may remain in his hands after sale. But even that position is not universally conceded. The present learned Chancellor of Ontario in *Beatty v. O'Connor* (*p*) has said: "The reasons which apply for the protection and encouragement of the volunteer who accepts an honorary trusteeship, out of which he can make no profit, do not require to be extended to the case of a mortgagee who, having made his debt, interest and costs out of the estate, holds possession of a surplus. He is not so much a trustee within the meaning of *Turner v. Handcock* (*q*) as he is a person who has received money for the use of another, as put by Ferguson, J., in *Boulton v. Rowland* (*r*). His position is, perhaps, succinctly expressed by Jessel, M.R., in *Talbot v. Frere* (*s*), as that of a bare trustee." Nothing is more fallacious than an imperfect analogy.

Lord Mansfield has said, with reference to the supposititious analogy at present under discussion, that there is nothing so unlike as a simile and nothing more apt

(*p*) 5 O. R. 747.

(*q*) 20 Ch. D. 303.

(*r*) 4 O. R. 720.

(*s*) 9 Ch. D. 568, 572.

to mislead. His dictum to that effect is referred to in the judgment of *Cholmondeley v. Clinton* (*t*), and it is there also said: "The position is to be received with considerable qualifications, as will appear by examining what is the true character of a mortgagee, and how he is considered in a Court of Equity. . . . The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, trustee and *cestui que trust*, have been applied to the relation of mortgagor and mortgagee, according to their different rights and interests before or after the condition forfeited, before or after the foreclosure, and according as the possession was in the mortgagor or mortgagee."

Quo teneam vultus mutantem protea nodo? The truth is it is a relation perfectly anomalous and *sui generis*. The names of mortgagor and mortgagee most properly characterize the relation; they are, as Mr. Justice Buller observes in *Buch v. Wright* (*u*), characters as well known and their rights, powers and interests as well settled, as any in the law. It is only in a secondary point of view, and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to a mortgagee." The numerous specific points of distinction between mortgagees with power of sale and trustees, together with the cases on the subject, will be found set out in Mr. A. T. Hunter's work on Power of Sale (*v*).

It is noteworthy that Mr. Lewin himself, from whose work Mr. Galt quotes, says (Am. Ed'n. 1888, fr. 8th Eng. Ed'n. p. 1077) "A mortgagee, after his debt has been fully paid is not an express trustee of the mortgaged property until reconveyance: 22 Ch. D. 614." And p. 396,

(*t*) 2 Jac. & W. 182.

(*u*) 1 T. R. 383.

(*v*) See also Armour on Titles, 2nd Ed'n. in the index whereof, p. 407, we find the short proposition, "Mortgagee with power of sale is not trustee," with reference to pp. 355, 471, 374, where the matter is more fully touched upon.

"Mortgagees are to some though not to all intents and purposes trustees, &c."

But, to leave the question of authority and decided cases for a moment, and consider the matter on its merits from an independent standpoint, is it such a foregone conclusion that a power of sale without notice is necessarily a grievous outrage upon the mortgagor? Even in this aspect of the case we confess it seems to us there is a good deal to be said on the other side. We believe it is not putting the case too strongly to say that in the vast majority of cases where powers of sale come to be exercised, the mortgagor has ceased to have much, if any, interest in the matter. When a mortgage reached that stage, it is generally found that subsequent encumbrances and executions exist sufficient to much more than eat up the surplus purchase money if any. In too many cases, especially in the depressed state of the real estate market during the last few years, it is found that, so far from there being a surplus, the mortgagee fails to realize sufficient to cover his claim. In a recent case in the writer's practice where the land was barely sufficient to cover the claim of the mortgagee, it was found that, what with subsequent incumbrancers and execution creditors, there were no less than twenty-three parties entitled to be served with notice. All of them were duly served, causing considerable additional expense. None of them took the slightest notice, and the mortgagor had long before (by reason of these numerous incumbrances) ceased to have any interest whatever in the matter. No doubt similar cases have occurred in the experience of most practitioners. When it is considered that it is almost inevitable that in such cases the parties to be served will be found to reside at different points, it becomes apparent that the trouble and expense of realizing under the mortgage is immensely increased, and in case the security is inadequate, the whole of such expense comes out of the pocket of the unfortunate mortgagee.

We would call attention also to the following view of the matter. It has been held (*w*) that where notice was by the terms of the power to be given to the mortgagor, "his heirs, executors or administrators," both the heir and the personal representative are entitled to be served with notice. The power of sale in the Short Forms Act requires notice to the "mortgagor, his heirs or assigns," and by R. S. O. cap. 108, sec. 10, it is provided that the personal representative of a person dying since the coming into force of the Devolution of Estates Act shall be deemed his heirs and assigns unless a contrary intention appears. Mr. Prideaux says (*x*):—"The power should be given to the mortgagee, his executors and administrators (not heirs) and assigns;" so that it seems tolerably certain that under any of the commonly adopted forms of powers of sale, the personal representative of a deceased mortgagor will be a party requiring to be served with notice before a valid sale can be had, the result being, as Mr. Armour (*y*) aptly expresses it that "inasmuch as a power exercisable upon notice to the personal representative is inoperative until there has been one appointed (*Parkinson v. Hanbury*, L. R. 2 H. L. at p. 18) it is very doubtful whether a mortgagee could make a title under his power until that event." So that if Mr. Galt's view is correct the mortgagee with a power of sale authorizing him to proceed without notice, must sit with folded hands in such case (so far as his remedy under the power is concerned) until it becomes the good pleasure of his mortgagor's representatives to put themselves in a proper position by proving the will or issuing letters of administration, to be attacked; a step, it may be scarcely necessary to add they will naturally, under such circumstances, be none too expeditious in adopting.

The truth seems to be that powers of sale without notice are in very many instances, even when exercised

(*w*) *Bartlett v. Jull*, 28 Gr. 142.

(*x*) 9th Ed. Vol. 1, p. 472.

(*y*) *Armour on Titles*, 2nd Ed. p. 363.

strictly according to their tenour, entirely proper and unobjectionable provisions, as well as being, if our view is correct, thoroughly valid ones. Mr. Galt's view is no doubt plausible and he has certainly displayed much ingenuity and force in maintaining it. Nevertheless, we cannot help thinking, for the reasons stated, that his conclusion is untenable. We are inclined to think, if the truth were known, it is the mortgagee and not the mortgagor who would be found to be the injured party in the great majority of cases where default occurs. It is seldom indeed that one hears of a mortgagor suffering hardship by reason of the harsh exercise of a power of sale by the mortgagee.

But how common a thing is it to hear of losses sustained by mortgagees, by reason of an excessive loan having been obtained upon his property by a mortgagor, through overvaluation. And in such cases, how seldom is it possible to recover the deficiency from the mortgagor through the personal remedy under the covenant. Such sympathy as is bestowed on either of the parties seems invariably to find its way to the mortgagor, though it is questionable whether the claims of the mortgagee are not perhaps stronger.

Indeed the sympathy for the mortgagor has recently undergone a very astonishing and abnormal development. If one may judge from numerous recent letters in the public journals, the startling view is now held by numbers of persons that it is an injustice, amounting almost to an outrage, to require a mortgagor to repay his loan at all. By what peculiar obliquity of vision they possess themselves of this view, one is at a loss to understand.

To an ordinary mind, a mortgage transaction is simply a loan of money with a conveyance of certain land as additional security that the loan shall be repaid. It is not a gambling transaction, as these people would seem to imagine, where one person (the mortgagee) in the hope or for the chance of ultimately becoming absolute owner of the latter's property by foreclosure or otherwise. Even

when the transaction does not take the form of an actual advance of money, but the mortgage is given on the occasion of a purchase to secure payment of the purchase money, the same remarks apply. If it were a gambling transaction, it may be added that it would be one where the dice were heavily loaded in favour of the mortgagor, inasmuch as if the property increased in value the latter would take especially good care that it did not fall into the possession of the mortgagee, whereas if it diminished below the face value of the mortgage, he would simply stand from under and leave the mortgagee to bear the loss as best he might—a case of “heads, I win, tails, you lose,” with a vengeance.

On the whole, it seems to us that this excessive solicitude for the mortgagor is but another phase of that misdirected sympathy which prompts divers well-meaning people to expend a vast amount of sympathy upon convicted murderers.

F. P. BETTS.

LONDON, CANADA.

EDITORIAL REVIEW.

The Canadian Copyright Act.

The Law Journal, 22nd December, 1894, sounds a note of alarm at the proposal to secure the assent of the Sovereign to the Act which has so long awaited Her Majesty's pleasure. Both the moral and legal aspects are touched upon. The Law Journal does not appreciate the Canadian view, which is that, as the United States publishers had, for years before the present American law, appropriated and republished English works, which eventually found their way into Canada, and indeed are the only editions to be had in this country the great proportion of such works, it would be an improvement and a benefit to both the English author and the Canadian publisher to allow the latter to publish the works here on paying a royalty to the author. In that event the English author would have got something where he before got nothing, a profit would have resulted to the publisher, and the pirated editions would not have entered the country. As the English prices are almost always beyond the reach of the general bookbuyer in Canada, it would have been decidedly advantageous in every respect. There is nothing in the proposal that could in any way be offensive. The English publishers make comparatively nothing on works of fiction in this country; the English author gets nothing as a matter of course. Under the scheme proposed, the author would get a royalty, the English publisher, nothing. *Hinc illæ lachrymæ.*

On the legal side the Law Journal remarks that "the claim is represented as being based on and intended to assert the self-governing powers of the Dominion." It is, indeed, not necessary to assert them, because they have been asserted in most emphatic terms by the Imperial Parliament in the British North America Act. Copyright is one of the subjects entrusted to the Parliament of Canada. It never was intended that the power

should be intrusted to the Parliament to make laws, but never exercised. Such a grant would have been most delusive on the part of the representatives of a country which insists on fair play. It is also against a well known maxim that one shall not derogate from his own grant.

By the same Act the same Parliament has acquired power to make laws respecting patents of invention. We have never heard that it worked an injustice to allow the Canadian Parliament to deal with patents granted in Britain, and require compliance with local laws. Then why not deal similarly with copyright? How better could an English author protect himself in Canada than by local copyright? He is in the same position as an inventor who protects himself by a Canadian patent. The intention in each case is to protect the person who exercises the mental skill, not the person who does the handiwork.

There can be no doubt, as the law officers of the Crown have stated, that Canada has no authority to repeal, or affect the English Copyright Act at all. It did not require an English opinion to establish that. It is a well understood principle in Canada. At first blush it was thought that the exclusive power to legislation on Canadian subjects implied the exercise of such power to the exclusion of the Imperial Parliament. So thought Draper, C.J., in *Regina v. Taylor*, 36 U. C. R. at p. 220; and in *Holmes v. Temple*, 2 Cart. 396, *Chauveau, J.*, thought that the Army Act of 1881 did not apply to Canada, although its express terms made it apply undoubtedly to the whole Empire at least. Section 153 reads, "any person who in the united kingdom or elsewhere by any means whatever 1) procures or personates any soldier to desert, etc." The ground upon which the learned judge rested his decision was that the Militia Act of Canada governed, and that Canada had exclusive powers of legislation if it chose to exercise them. Chief Justice Draper's opinion, however, was soon abandoned, and *Holmes v. Temple*

cannot be regarded as a sound decision on the ground stated. In *Regina v. Coll. of Physicians and Surgeons of Ontario*, 1 Cart. 761, it was held that the English Medical Act obliged the College in Ontario to license a practitioner who was licensed under the Imperial Act, and in *Smiles v. Belford*, 1 Cart. 576, the Imperial copyright Act was expressly held to be in force here and unaffected by the Canadian Copyright Act.

Indeed, it is upon this express ground that the recent Act was reserved for Her Majesty's consideration. Recognizing the fact that Canada is powerless while the Imperial Act is in force here, the Governor General, on the advice of his ministers, of course, reserved the Act for Her Majesty's pleasure. There is no attempt to repeal the Imperial Act. Such an attempt would be futile. And it is entirely out of place to refer to the attempt to control copyright in this country as piracy. "The claim of the Canadian publishers" is not as the Law Journal puts it "to be allowed the same license of piracy exercised by their United States competitors, if assented to by the Imperial government. To refer to a law passed by a competent authority and assented to by the Queen on the advice of her ministers, as licensing "piracy" is out of the question on legal grounds and beyond the realms of good taste. As well might the Canadian patent laws be referred to as licensing piracy.

The Ambulatory Court.

The Ambulatory Court has sat in London and Ottawa, and the amount of business transacted has been practically nothing. If one Judge had not been resident at one place, another on circuit at the other, we doubt whether any sittings would have been held. We noticed that the local bar in one part of the country have laid it down that the Judge holding Court should not take cases from certain towns until after the arrival of the train from those towns. Whether the Court will take the hint or not has yet to be seen. If it ignores this very reasonable request, the result will most likely be that the Judge will eventually have to go to the town where the practitioners reside, instead of

waiting for them at the place appointed for holding the Court—the Act having been passed expressly for the benefit and convenience of local practitioners, and being susceptible of a wonderful amount of development along the same line.

Privy Council Decisions.

We are glad to hear from Mr. Lefroy on this subject, as he has made a special study of constitutional questions. His contribution to this journal (12 C. L. T. 125) on the conflicting decisions of the Privy Council anent the question of jurisdiction with respect to the sale of intoxicants, to a large extent confirms the view that we have taken as to those decisions. If not conflicting they are so difficult to explain that there is nothing like harmonious opinion upon them.

But we do not think that Mr. Lefroy gives a satisfactory explanation of what we must still say is the conflict between *Tennant v. Union Bank* and *Citizens' Ins. Co. v. Parsons*. In the latter case the legislation in question was Provincial, not Dominion legislation. The Ontario Act required all insurance companies doing business in Ontario to conform to certain conditions which were annexed to every contract. The insurance companies having been incorporated elsewhere took exception to the right to limit them in their mode of doing business ; but the Act was upheld because the Provincial Legislature had authority to deal with contracts generally within the Province without regard to the persons or corporations who might come into the Province or be affected by the Act.

In *Tennant v. Union Bank*, however, the question was with regard to Dominion legislation on a subject which was *prima facie* of Provincial jurisdiction. Could the Dominion Parliament pass a special law affecting warehouse receipts, there being admittedly a Provincial Act valid in itself regulating the business of warehousing in the Province? The Court held that it could. Now if this decision is carried to its legitimate extent, there is no reason why the Dominion Parliament may not pass a

chattel mortgage Act for Banks, an Act affecting real property, and registration of title, and in fact re-construct the whole law of property and civil rights for Banks, so that we shall have one system of law for Banks and another for private persons.

Again, following out the same line, there is no reason why the Dominion Parliament should not incorporate an Insurance company and expressly authorize it to do business free from Provincial laws affecting contracts of insurance. Mr. Lefroy's point is that the Dominion cannot do this because it has not exclusive jurisdiction over Insurance companies. That, however, is not the real issue. The point in issue is whether the Dominion can legislate with regard to property and civil rights. If the Dominion has any jurisdiction over Insurance companies it must have complete jurisdiction; and if it may incorporate one at all, it may do so fully and give it all essential rights, and so may give it express authority to do business in a way not permitted by Provincial laws. It is not the Provincial jurisdiction over Insurance companies that enables the Legislature to regulate their contracts; it is the jurisdiction over contracts themselves which enables them to fix a form of contract for all companies. So if the province has jurisdiction over warehouse receipts and the property and obligations involved, it ought to be able to fix them for all persons and corporations doing business in the Province.

It has never been held that Dominion jurisdiction gives any jurisdiction to alter the law of property in a Province except perhaps in Insolvency proceedings. There are certain classes of property *created* by the Dominion, such as patents of invention, copyright, bills, notes, etc., which being possible of creation by the Dominion can be dealt with by it as its creatures. To that extent it invades theoretically "property and civil rights." But it goes no further, save in Insolvency proceedings, which have everything to do with property and civil rights. We still think that Mr. Lefroy's suggestion does not clear up the matter.

BOOK REVIEWS.

The Division Courts Act and Amendments. By JAMES. BICKNELL and EDWIN E. SEAGER. Toronto: The Goodwin Law Book and Publishing Company (Ltd). 1894. We noticed the first volume, containing the statutes and notes therein, more than a year ago. The second volume has now made its appearance, containing the rules and forms, the Acts of 1893 and 1894, and an appendix of those sections of other statutes which confer jurisdiction on Division Courts. A table shewing the boundaries of the territories of Division Courts is also given, and the editors have supplied a large number of forms in addition to those authorized by the Acts and rules. The matter is all good and useful.

The Manitoba school question, being a compilation of the Legislation, the legal proceedings, the proceedings before the Governor-General-in-Council, an historical account of the Red River outbreak in 1869 and 1870, its causes, and its success as shewn in The Treaty—The Manitoba Act, and a short summary of protestant promises. By JOHN S. EWART. Toronto: The Copp, Clark Company. 1894.

Mr. Ewart, whose connection with the Manitoba school case is so well known. is nothing if not an enthusiast. More patient industry, more zeal, never were enlisted on behalf of any client. None but an enthusiast could have compiled the work which we have just received. It contains newspaper articles, speeches, letters to the Press, the proceedings before the courts and all information that is extant upon the question. As to the controversial portion, we cannot enter into it. As to the legal portion, the case having been disposed of by the supreme authority in Colonial matters is beyond the realm of argument; and the whole matter is now cast back into the political arena into which we do not feel inclined to enter.

CORRESPONDENCE.

Privy Council Decisions.

The Editor CANADIAN LAW TIMES :

SIR,—I have been reading the editorial in your issue for December last, entitled, "The Privy Council Decisions," and also the article in the *Canada Law Journal* which you there criticise. I do not propose to intervene in the discussion of the decisions of the Judicial Committee in respect to liquor laws, having contributed what I am able to towards that discussion in the article published in your twelfth volume upon the aspect of legislation as determining its constitutionality. But, you now charge the Privy Council with inconsistency also in their decisions in the cases of the *Citizens' Insurance Co. v. Parsons*, and *Tennant v. The Union Bank*. Will you allow me to say that I think that there is certainly no room for charging inconsistency here inasmuch as the considerations governing the question in issue in the first of those cases were quite different from those governing that which was in issue in the second. In *Tennant v. The Union Bank* their lordships were dealing with one of those subjects which is assigned exclusively to the Dominion Parliament, namely, Banks and Banking, and decided that when legislating upon that subject Parliament might provide under what circumstances banks could hold and deal with warehouse receipts. On the other hand in *Citizens' Insurance Co. v. Parsons* they were dealing with the right of a Dominion or foreign Insurance Company to do business in the different provinces. But the Dominion Parliament has no exclusive right of legislation in relation to Insurance and Insurance Companies. Therefore, the considerations governing that case were I think, quite different from those governing *Tennant v. The Union Bank*.

Yours truly,

A. H. F. LEFROY.

HAMILTON LAW ASSOCIATION REPORT FOR 1894.

The Trustees beg to submit their fifteenth Annual Report being that for the year 1894.

The number of members at the date of the last report was 71. One member has resigned, one left the county and three have been added during the year. The present membership is 72. The annual fees to the extent of \$335.00 have been paid. The number of bound volumes in the Library is 2771, of which 152 were added during the past year. Sessional papers, gazettes, etc., are not included in the above. The Trustees have been able during the past year to add many useful and valuable text books and reports to the Library. The following periodicals are received, namely :—The Law Times, The Times Law Reports, The Law Journal Reports, The Solicitors' Journal, The Albany Law Journal, The Canada Law Journal, The Canadian Law Times, The Western Law Times, The Green Bag, The Law Quarterly Review and The Toronto Mail.

The Treasurer's Report is submitted herewith giving a detailed statement of Receipts and Expenditures, in the form required by The Law Society. All the liabilities of the Association have been paid, except a note for \$100.00 and the balance of the loan due to the Law Society, payable in yearly instalments of \$100. The amount yet to be paid is \$500.000.

The Hamilton Law Association share in the deep sorrow which has fallen upon the whole Dominion at the sudden death of the Right Honourable Sir John

S. D. Thompson, Minister of Justice and Premier of Canada and who had on the day of his lamented death received the honour of being sworn in as one of Her Majesty's Privy Councillors.

The Association look back with deep interest to the occasion on which, little more than a year ago, Sir John Thompson accepted an invitation of the Association to visit their library and honoured the members with his presence, addressing them in terms which gave great encouragement to the work of the Association and giving them, at the same time a substantial recognition of his interest in their progress by a donation of valuable law books.

Sir John Thompson has always since his accession to office taken a deep interest in the honour and welfare of the legal profession who in turn have felt the highest admiration for his great talents and unsullied integrity.

His death will be a great loss to that profession to the members of which he was an illustrious example and on which, by his distinguished talents and high character, he has conferred lasting honour.

The Association desires to convey to his bereaved widow and family their sincere and heartfelt sympathy in their sad and irreparable loss.

As was anticipated in our last Report an act was passed last session extending the jurisdiction of Local Judges. The new rules, which came into force in January 1894, have on the whole worked well. Sufficient time has not yet elapsed to test the working of the rules passed in September last and since that date and no doubt further rules will be required from time to time. It is a matter of the utmost importance that the profession should have these rules at the earliest possible time after their being passed. The Association would, therefore, suggest that the Law Society be asked to arrange for the issue (gratis) to every member of the

profession of a copy of every new Rule immediately after the passing thereof. The present system of publication is far too slow and unsatisfactory, many members of the profession do not take either of the Law Journals, and though the daily papers do contain the Rules, yet they are in that form apt to be lost and not in a convenient shape for use.

The necessity for Amendments to the Devolution of Estates Act have been pressed upon the proper authorities, and it is hoped that action may soon be taken thereon so as to enable lands to be sold with the approval of the Judge of the Surrogate Court or Local Master without the necessity of an application to the official Guardian, and, generally, as far as possible to permit business being disposed of in the county where probate or administration has been granted.

The Insolvency Act introduced in the Senate, at the last session, was carefully considered by the Trustees and certain amendments were suggested, but the bill was withdrawn after much discussion. It will probably be introduced at the next session with some important changes. The incoming Trustees will doubtless watch the passage of the bill and make such suggestion as may seem proper.

The Trustees have much pleasure in reporting that during the year the Dominion Government authorized the importation of Books for Law Libraries free of duty. The Trustees will continue to press the Government for an allowance for purchase of works on Criminal and Election Law, Insolvency and all other branches of law over which The Dominion Government has jurisdiction.

While gratefully acknowledging the assistance received in the past it is hoped that the Ontario Government will, during the present year, increase the allowance to each Association to \$100.00.

The Librarian keeps the "Current Digest" regularly written up and makes daily clippings of the notes of cases from the "Mail." These are kept in a book which has been found very useful to the members of this association during the year.

All the Books in the Library have been stamped with the seal of the Association.

The thanks of the Association are due to the Hon. A. S. Hardy for a map of Ontario, to the Attorney General of Quebec, for the Revised Statutes of Quebec, and to Mr. Edward Martin, Q. C., for Brown's Parliamentary Cases and Supplement.

During the past year this Association lost by death the late R. R. Waddell, who had been one of the original trustees and has cheerfully given valuable services on many occasions.

Nothing has yet been done to render uniform the fees paid for similar services in the respective offices of the Master and Deputy Clerk of the Crown it is hoped that another year will not be allowed to pass without this being remedied.

EDWARD MARTIN, *President.*

THOMAS HOBSON, *Secretary.*

THE CANADIAN LAW TIMES.

MARCH, 1895.

THE LIBEL ACT OF 1894.

(Continued.)

SECTION three, although in itself an independent provision does not appear to be in its proper place in the Act. It should, strictly speaking, follow instead of precede section 5, which deals with the consolidation of different actions for the same libel, and the assessment of damages and apportionment of costs in such cases. Sections 3 and 5 seem to be the complements of each other. The corresponding sections of the English Act of 1888 are 6 and 5 respectively, 5 immediately preceding 6, which would appear to be the proper order of the sections in our own statute. Each of the sections is aimed at those who make a trade of actions for libel against newspapers, and is a straight "hit from the shoulder" against the traders. Confining ourselves meanwhile to section 3, the following cases illustrate the state of the law prior to the passing of the Act, and the change which was intended to be effected by that amendment:—

Hunt v. Algar (*a*) was an action against the publisher and two of the proprietors of the "True Sun" newspaper for a libellous paragraph imputing criminal conduct to the plaintiff in an alleged murderous "riot at Preston." The paragraph as published was credited to the "Liverpool

(*a*) 6 C. & P. 245.

Courier," but it turned out not to have been copied from that paper, but from the "Liverpool Journal." The plaintiff had already sued and recovered damages and costs in separate actions against the "Journal" and the "Globe" for publishing substantially the same libel. He was held entitled to recover damages in the present action also. He sought only nominal damages, and these he secured, together with full costs. It does not appear from the report whether the fact of the plaintiff's having recovered damages in the two previous actions was tendered in evidence; but, according to the decision in *Creevy v. Carr* *infra*, which was given about two years later, there can hardly be a doubt that the evidence would not have been received. The case otherwise illustrates the then state of the law.

In *Creevy v. Carr* (b) the action was for a libel contained in the "Morning Advertiser," imputing to the plaintiff the crime of arson. The libel purported to be a report of an examination which had taken place at the Hatton Garden police office. It was proposed, on the part of the defendant, to prove in mitigation of damages, that the alleged libel had appeared in the "Weekly Despatch" newspaper, and that the plaintiff had brought an action against the proprietors of that paper and had recovered damages against them. Gurney, B., the trial Judge, after conferring with six other Judges who were sitting in the Exchequer Chamber, held that the evidence was inadmissible. It was then proposed, on defendant's behalf, to show, in mitigation of damages, that the libel was copied in substance from the "Weekly Despatch," with an omission of certain passages which reflected on the plaintiff. This evidence was received.

Tucker v. Lawson (c) was an action against the proprietor of the London "Standard" by a solicitor named John Tucker, who was on the solicitors' roll, certificated

(b) 7 C. & P. 64.

(c) 2 T. L. R. 593.

and in full practice. The libel charged was contained in a report in the newspaper of an application in the High Court against a solicitor of the same name as the plaintiff to answer very serious charges of misconduct, for which he was ordered to be struck off the roll. By the mistake of the reporter the offender was described as "John Tucker," of a certain address, which was that of the innocent plaintiff. The mistake arose through looking at a law list of the current year, in which the plaintiff's name was the only one of that name that appeared. As the address of the solicitor struck off was not mentioned in Court, the reporter naturally came to the conclusion that the only "John Tucker" whose name he could find in the law list, must be the offender, and so he inserted the name, with the address which he found attached to it, which was that of the plaintiff. The mistake was widely circulated in other newspapers besides the "Standard," and a number of these, including the "Standard," were sued by plaintiff. The plaintiff complained of loss of business and of heavy expenses incurred in searching the files of newspapers, ascertaining other publications of the libel, getting contradictions inserted, etc. Thereupon the defendant applied for leave to interrogate the plaintiff as to such other publications of the libel, and as to money received or recovered in such actions, etc. This was refused in Chambers and also on appeal. One argument used in support of the application was that the defendant was entitled to the benefit of the information as to other publications obtained by plaintiff, and which it was claimed should be paid for by defendant, and that the defendant was also entitled to know whether the plaintiff had received money in any of the other actions, as it was material with reference to damages. Otherwise the plaintiff might recover damages for the loss of business caused by other publications of the libel. Against this it was urged that the application was without precedent, and that the answers would be quite irrelevant. Twenty-three provincial newspapers, against which actions had

been brought, were represented on the appeal motion, which was dismissed by Denman, J., on the ground that the information sought was irrelevant in the action, except as to cross-examination, for which purpose, of course, it could not be granted.

In *Frescoe v. May* (d), the action was against the defendant as the writer of a libel published in the *Medical Circular*. The paragraph was headed "Quack Dentists," and imputed that the plaintiff, a dentist, was a "quack." There had been a former action by the same plaintiff, for the same libel against one Yearsley, as the proprietor and publisher of the newspaper, and a verdict recovered for forty shillings damages. In that action the defence was that the paragraph complained of was supplied to the then defendant as a report. The present defendant pleaded, *inter alia*, not guilty, and that the libel was true. For the plaintiff it was proved that the present defendant had written the paragraph, as *he* said, at the request of the former defendant, Yearsley. The present defendant attempted to prove that the report was fair, and that the paragraph was in the nature of fair comment, or that it was in substance true; but no attempt was made to prove the imputation contained in the word "quack." It was argued that the publisher Yearsley was the party really responsible. The trial Judge, Earle, C.J., held that the defendant, as author, was liable in substantial damages for the injury proved to have been sustained by the plaintiff in consequence and since the publication of the libel, notwithstanding the previous verdict against the publisher. The verdict for plaintiff for £450 damages was upheld by the Court of Exchequer.

In *Harrison v. Pearce* (e) the action was by the proprietor of three newspapers, the "Sheffield Times," daily and weekly, and the "Sheffield Daily News," against the proprietor of a rival newspaper, the "Sheffield Daily Tele-

(d) 2 F. & F. 123.

(e) 1 F. & F. 567.

graph," for a libellous address or statement of a printer's society published in the defendant's paper as an advertisement, and charging the plaintiff with oppressive conduct towards his printers, and with certain disreputable practices as a newspaper proprietor. The damage laid was that the circulation of the plaintiff's newspapers had become lessened. The plea was a justification. The address was sent by one Bingham, president of the society, to one Hinchcliffe, to be printed as a placard, and several thousand copies were thus printed and circulated in addition to the publication and circulation in the "Telegraph." Two actions were pending against Bingham as writer, and Hinchcliffe as publisher, of the address when the present action was tried. The defendant failed to prove his plea and it was shown that the publication of the libel, as a placard and as an advertisement, had caused a decline in the circulation of plaintiff's papers. This evidence was objected to by the defence on the ground that it went to establish special damage not necessarily arising from the defendant's publication, that the present defendant was not responsible for the publication of the placard, and that as another action was pending for that injury, the jury could not consider it. The trial Judge, Martin, B., held that the jury were not bound to take into consideration that the other actions were pending against the other parties for publishing the same libel, but that they might give the plaintiff in this action such general damages as they thought had arisen from the decline of circulation, even subsequent to the action. The verdict for plaintiff for £500 damages was moved against without effect before the Court of Exchequer.

In a later unreported case of *Aylmer v. Gray*, in the Irish courts, where damages were recovered against the proprietor of the "Freeman's Journal," the plaintiff had already mulcted various other newspapers in large sums for the same libel. The libel consisted of a misprint in the report of a divorce suit which had been sent by a news agency to all the journals amerced. Each action was

tried separately, but none of the defendants was permitted to prove, in mitigation, any previous verdict for the same libel. The aggregate damages were enormous, and altogether disproportionate to the offence.

These cases not only show that the species of evidence, in mitigation of damages, now made admissible by section 3, was formerly inadmissible, but, as we shall see, they throw considerable light on the reasons for the amendments contained in section 5. The relief afforded to newspapers by section 3 is an addition to what they have enjoyed for many years under section 4 of the Revised Statute, which permits an apology to be made or offered, and the fact of this being done to be proved, in mitigation of damages.

Evidence in mitigation of damages may also be given in all actions for libel under Rule 573 of the Ontario Judicature Act. Under this Rule the defendant may prove, in mitigation, the circumstances under which the libel or slander was published, or the character of the plaintiff, provided that, seven days at least before the trial, he has furnished to the plaintiff particulars of the matters as to which he intends to give evidence, or has pleaded the truth of the words complained of; otherwise he cannot give such evidence, except by leave of the Judge. One of the prime objects of the Rule was to obviate the effect of *Scott v Sampson* (f). That was an action for defamation in which a justification was pleaded, and in which it was held that evidence as to the character of the plaintiff, with a view to mitigation of damages, could not be admitted, unless the facts proposed to be proved were set out in the pleading.

There are many reported decisions illustrating the advantages of this Rule to newspaper publishers, albeit these are shared by them in common with all defendants in the species of actions to which it applies. Wherever the Rule can be made use of, the notice required should be given,

(f) 8 Q. B. D. 491.

otherwise the evidence referred to cannot be admitted without the special leave of the trial Judge. Its admissibility would be in his discretion, which would scarcely be interfered with. Such evidence may be very material, because it may influence the jury to give no more than nominal damages, and these may in turn affect the costs which, under our new Rule as to costs in such actions, are entirely in the discretion of the Court. The effect of the Rule which provides for the seven days' notice being given, is not, it seems, to enable the defendant to give in evidence what, before the Rule came into force, he could not give, but merely to prevent him giving the evidence therein specified, unless he does give such notice.

One of the principal complaints of the newspaper press has been that insufficient protection is extended it in regard to "secondary libels," namely, defamatory matter copied from other newspapers, or received by telegraph or otherwise through news agencies or any common or trustworthy medium of intelligence. An effort was made to secure a provision in the Libel Act of 1894 permitting publishers to make a valid defence by proving that the libel complained of was so copied, or received, by the newspaper, and was published with reasonable care, in good faith, and without actual malice to the plaintiff, and that a full retraction and apology was published, promptly and conspicuously, in the newspaper. The objection to this was, that while such a defence might be honestly established, it might not undo the wrong done by the libellous publication. The whole question of "secondary libels" is beset with difficulties, and not easy of solution, and for the time being, at all events, it was found impossible to deal with it directly. Some material relief, however, is afforded indirectly by section 3 of the Act already quoted, and by section 5, which will be noticed hereafter. As the law now stands, the matters thus sought to be proved under the proposed amendment, as a complete answer to an action, may be given as a partial answer in mitigation, under section 3 of the Act.

It is evident, therefore, that a newspaper has a variety of strings to its bow when standing on the defensive in the Courts for a defamation which cannot be justified, but which is in any way capable of being toned down or mitigated. Its means of protection, or partial protection, in this respect have been multiplied and strengthened by the Act of last session. If, prior to that Act, a libellous article, or a libellous news item or telegraphic despatch, sent through a news agency or derived from any other source, had been copied by one newspaper from another, or had appeared simultaneously in a number of newspapers, a publisher sued for the libel, however innocent of actual malice, could not give evidence that the party libelled had already (1) brought an action; (2) recovered damages; (3) received compensation; or (4) agreed to receive compensation, for the libel from any one or more of the other offenders. Such evidence was held to be immaterial and irrelevant, and, therefore, inadmissible. This anomalous procedure has been swept away by the new Act.

Section 4.—This section limits the time within which an action may be brought for a libel contained in a newspaper. It enacts that “every action for libel contained in a newspaper shall be commenced within three months after the publication complained of has come to the notice or knowledge of the person defamed. But where an action is brought and is maintainable for any libel published within said period of three months, such action may include a claim or claims for any other libel or libels published against the plaintiff or plaintiffs by the defendant, in the same newspaper, within a period of one year prior to the commencement of the action.”

The section, as originally drafted, was intended to prevent an action for libel against a newspaper publisher being kept dangling over his head for an indefinite period, and thus muzzling the newspaper, and the whole newspaper press, with respect to a matter which, in the public interest, might require discussion. This muzzling process

is accomplished by simply launching the action and keeping it afloat in the usual way. The matter being then *sub judice*, the defendant runs a risk of proceedings for contempt if he permits further comment in his newspaper. While admitting the necessity for restraining comments which might prejudice the fair trial of an action, journalists have frequently complained, with good reason, that the power of restraint was abused so as to stifle fair criticism. The present practice was said to be unsatisfactory in this particular; but, such as it is, it remains unaltered.

Section 4 has made a material change in the law as to the time for bringing an action for libel contained in a newspaper. Formerly the action had to be commenced except in a case of disability, such as the infancy of the complainant, within two years after the cause of action arose (*g*), that is to say, within two years after the date of publication of the libel. In cases of disability the statutory period commenced to run when the disability was removed. Under that statute of limitations if a party were entitled to sue, the fact that the libel had not come to his notice or knowledge did not excuse or aid him. If for two years from the date of its original publication he were ignorant of its existence and took no proceedings, his right of action was gone. We say "original publication" because it must be remembered that every sale or delivery by the publisher, or his agent, of a copy of the newspaper containing the libel was in law a fresh publication. The Duke of Brunswick's case was a singular instance of this. With a view to a suit for damages the plaintiff's agent called at the office of the defendant's newspaper and bought a copy of the paper containing the libel, which had appeared seventeen years previously. It was held that this was a fresh publication by the defendant, and that the action lay in spite of the statute of limitations (*h*). The mode adopted in that case of

(*g*) R. S. O. cap. 60, sec. 1 sub.-sec. 1, (*g*).

(*h*) Duke of Brunswick v. Harmer, 14 Q. B. 185.

proving publication is the one usually followed in Ontario. A copy of the paper is purchased at the office of publication, and marked by the purchaser for subsequent identification at the trial. Our statute makes no provision for proving publication, and is in this respect defective.

Under section 4 of the Act of 1894 every action must be commenced within three months "after the publication complained of has come to the notice or knowledge of the person defamed." What does this mean? Does it mean direct personal notice or knowledge, e. g., by reading the libel, or hearing it read; or does it mean such other notice or knowledge as will put the person defamed upon inquiry, e. g., a written or verbal communication informing him of the publication of the libel. Any notice or knowledge, direct or indirect, which will give the party to understand that there has been a defamatory publication concerning him in the newspaper, would, we should say, be sufficient. Otherwise the person defamed, by simply avoiding direct personal notice or knowledge, might extend the period of limitation indefinitely. The statutory period for bringing the action will commence to run from the time when the notice or knowledge was first received, and, if the statute be pleaded in bar of the action, the plaintiff would have to prove when he became aware of the fact, and that his writ was issued within three months afterwards. If, in the Duke of Brunswick's case, such a provision as section 4 of our new statute had been in force in England at that time; the plaintiff could not have slept on his rights for seventeen years, and then have revived them by the simple purchase of a copy of the paper from the publisher. He would have been obliged to sue within three months after he knew of the publication complained of; otherwise his right of action would have been lost.

The second clause, or rather sentence, of this section—because it is not printed distinctively as a clause, and might better have been inserted as a proviso—was added on the second reading of the bill. It is evidently intended to restrict the benefits otherwise conferred by the first

clause upon any newspaper which has been libelling the complainant by other defamatory publications in its columns within a year prior to the lawful commencement of an action for any particular libel in that newspaper. A newspaper which has been so engaged in assailing any person may be compelled, under this clause, to answer for all the defamatory matter which it has published concerning him within a year prior to action brought. This is a very proper provision, especially in the case of a deliberate defamer of character and reputation. The professional libeller is the bane of the newspaper press, and should receive no quarter.

Some question may arise under this section as to what claims for "other libels" may properly be included in the same action. There are seven conditions on which such claims may be made, namely, (1) that a certain action has been brought for some particular libel contained in a newspaper; (2) that it has been commenced within three months after the plaintiff in the action has had notice or knowledge of such libel; (3) that it is "maintainable" by the plaintiff against the defendant for the particular libel sued on; (4) that the claims for the other libels are by the same plaintiff or plaintiffs against the same defendant; (5) that such other libels were published by the same defendant against the same plaintiff or plaintiffs; (6) that they were published in the same newspaper; (7) that they were so published within one year prior to the commencement of the action in which they are included.

Besides these conditions, which appear in the section itself, there is at least one other condition, namely, that contained in R. S. O. cap. 57, sec. 5, sub-sec. 2, requiring notice of complaint of the particular libel which has provoked proceedings. This particular libel is not necessarily the last one, in point of time, which has appeared in the newspaper. It may be any libel which has ceased to make endurance a virtue, so long as it is sued on within the statutory period limited by the Act. Any libel published subsequently could form the subject of a

separate action; but, in any event, could be used as evidence of malice. The statutory notice is essential to the maintenance of the particular action in which the claims for other libels are included. It should specify the statements complained of, and should be served on the defendant as directed by the statute. If this notice has been omitted the action is not "maintainable." It is important to observe, in this connection, that no statement in the newspaper, however libellous it may be, which is not set out and complained of in the notice, can form any part of the subject matter of the action. In other words, the claim for damages in the action can be based only on the statements complained of in the notice, and on none other. This was expressly decided in *Obernier v. Robertson* (i).

Assuming, however, that notice of complaint has been duly given, is similar notice required of the other libels, claims for which, the statute says, may be included in the same action? The new Act is to be read as part of the Revised Statute, which is very plain as to the conditions on which an action shall lie. "No such action," it says, "shall lie unless and until the plaintiff has given to the defendant notice in writing specifying the statements complained of." The notice is a condition precedent to the plaintiff's right of action for any such statement; and, as we have seen, no statement, which is not complained of in the notice, can form a ground of claim or action against a newspaper. One object of the enactment respecting notice was to protect newspapers, to a certain extent at least, against libel actions. Another was to apprise the publishers of the injustice and injury caused by statements printed, perhaps, in good faith and without actual malice, and to give an opportunity of rectifying, by correction and apology, any wrong done by the publication. No fair-minded publisher will refuse to do this, and when it is done, although in itself no complete answer to a subsequent action, an amicable settlement is generally the

(i) 14 P. R. 553.

result. Proceedings are seldom persisted in unless the complainant has really suffered damage despite the *amende* made in the newspaper. The enactment has in this way acted as a preventive of litigation. The effect of permitting claims to be made for libels of which no notice had been given, would be virtually to set aside the enactment as to notice altogether, and there is nothing to show that this was intended by the Legislature. This section (4) deals with the time limit set for actions against newspapers; it was intended to shorten, and in effect must shorten, the old statutory period of limitation. But, having regard to the fact that a person may have been the victim of newspaper vilification, it does not deprive him of the right of showing this, and of using his remedy therefor, provided he has taken the necessary steps for that purpose. One of these is notifying his assailant beforehand of any statements complained of. It would be manifestly unjust to proceed for damages for any particular statement of which no complaint had been made, and of which, perhaps, the publisher might be in utter ignorance until the action itself had been instituted.

J. KING.

(To be concluded.)

RECENT AMENDMENTS TO THE RULES.

The lengthy article from the pen of Mr. W. H. Blake, in a recent number of this Journal, under the above heading, has induced the writer to ventilate a similar grievance, though a much smaller one. Upon receipt, about two years ago, of the exhaustive report of the Committee of the County of York Law Association, on certain suggested amendments to the Consolidated Rules, the County of Carleton Law Association appointed a committee to consider the same, and also certain additional suggested amendments. On 31st January, 1893, copies of the report of the latter committee were forwarded to the President of the High Court of Justice and to the secretary of the York Law Association. No reply or acknowledgment was received from the former, but from the convener of the Legislation committee of the latter, a letter was received stating that the suggested amendments had been considered and approved at a special meeting, and a further report embodying the same as well as suggestions from other sources, had been prepared and laid before the Judges. As, however, these suggested amendments are not referred to in Mr. Blake's article, the writer deemed it advisable to briefly explain them, to show the propriety of their being adopted, should a real revision of the Rules take place hereafter.

Rule 432 (a).—It was suggested that this should be amended by inserting after the word "written" in the second line, the words "or underlined," because of the practical difficulty of literally complying with the Rule as it at present stands, where the amended pleading is typewritten.

Rule 492.—After the word "Judge," in the first line it was proposed to add the following: "On notice to the opposite party." There is an unreported decision of

Galt, C.J., in *Calder v. McLay*, (Globe, January 23rd, 1893), that an order for the examination of a party under this Rule should not be made *ex parte*, but it is advisable that the practice should be made clear, as it is important that the opposite party should have notice of the place at which and the person before whom it is proposed that he should be examined.

Rule 508.—The amendments suggested in this Rule were to strike out the words “10 days,” and substitute therefor the words “the time hereinafter specified,” and add to the Rule the following:

“(a) If such party resides within any part of Ontario other than the districts of Algoma, Thunder Bay, or Rainy River, such time shall be 10 days.

(b) If such party resides within any of said districts or elsewhere in the Dominion of Canada or in the United States of America, such time shall be 20 days.

(c) If such party resides within any part of the United Kingdom or Newfoundland, such time shall be 30 days.

(d) If such party resides elsewhere than within the limits above designated, such time shall be 40 days.”

The necessity for this amendment will be apparent to any solicitor who has been served with an order for production, and whose client lives at such a distance that it is impossible to comply with the order within the 10 days. At present the only remedy is to apply for an order to extend the time, and pay the costs of such application, or run the risk of a motion to dismiss or strike out defence for non-compliance with the order.

Rule 524.—After the word “Judge,” in the fourth line, it was proposed to add the following: “on notice to the opposite party.” Probably the decision in *Dewalt v. Hughitt* (a), is an authority that the order under this Rule should not be made *ex parte*, but it is better that the matter should be made clear.

(a) 7 P. R. 323.

Rule 926.—After the word “Judge” in the sixth line, it was proposed to add the words “or Clerk.” This is intended to remove the anomaly at present existing, by which a local registrar or deputy clerk of the Crown, who is also Clerk of the County Court, may issue an appointment to examine a judgment-debtor in the High Court, but not in the County Court.

Rule 930.—It was suggested that the following should be added :

“(a) Where no order is made for such examination, the appointment shall be issued only upon the party examining, filing with the Judge or officer a return of *Nulla Bona* to a writ of *fi. fa.* goods by the Sheriff of the County in which the debtor resides, or a notice from the Sheriff that if called upon to return the execution such would be his return.” This, it is conceived, is the intention of the Judgment of Mr. Justice MacMahon in *Ontario Bank v. Trowern* (b), though in a subsequent unreported decision of Mr. Justice Falconbridge, in the case of *Ames v. Claffey*, (Globe, Feb’y 24th, 1892), it is said that the above formal proof is not required to be produced to the examiner before the appointment is issued. The former seems the more reasonable practice, as otherwise there is nothing whatever before the examiner on which to found the application.

Rule 935.—It was suggested that the following English Rule (Order 45, Rule 10), should be added :

“(a) ‘Any other person’ shall include a firm, any member of which is resident within the jurisdiction, and a garnishee order may be made against such firm in the name of the firm ; and any appearance by any member then within the jurisdiction pursuant to any order made under this Rule, shall be sufficient appearance by the firm.” The latter Rule has, however, been repealed in England and the following Rule substituted for it :

(b) 13 P. R. 423.

“ 648 (i)—Debts owing from a firm carrying on business within the jurisdiction may be attached under Order XLV. (our Rule 935), although one or more members of such firm may be resident abroad ; provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.” The object of Order 45, Rule 10, was to permit of a firm's being garnisheed, just as it might previously be sued, in the firm name ; and it is stated in Snow's “Annual Practice,” for 1895, that the substituted Rule 648 (i) has the same effect, though it does not seem very clear. In any case, the importance of the principle must be apparent, and provision should be made for its adoption.

Rule 1219.—After the word “enumerated” in the fourth line, it was proposed to add the following: “in all actions in the County Court and.” It will be noticed that this Rule, as it now stands, does not make the 2nd column of Tariff B. applicable to County Courts, but only to those cases in the High Court which were, before the abolition of the equity jurisdiction of the County Courts by the Law Reform Act of 1868, within the jurisdiction of the County Court.

Rule 1242.—It was suggested that the following should be added:—(a) “In actions in the County Court the amount of such security shall be in the sum of \$200.00.” At present no distinction is made in the Rule between the amount of security to be given in High Court and County Court cases, though apparently the practice is to require only one-half the amount therein mentioned in County Court cases.

Rule 1251.—It was suggested that the following should be added:—(a) “In actions in the County Court the amount of such security shall be in the sum of \$25.00.” The same reason applies to this amendment as to the previous one.

The above remarks embody the suggestions contained in the report of the committee of the Carleton Law Association. As to the difficulty with regard to bailable proceedings, referred to in the report of the York Law Association, and also in Mr. Blake's article, it was also subsequently suggested by our committee that the English Marginal Rules 1030 to 1036 inclusive, should be substituted for Con. Rules 1055 et seq., which would very much simplify the practice, and make one bail bond or deposit in Court suffice, instead of both bail to the Sheriff and bail to the action having to be given, as required under the present cumbersome procedure.

The writer has discussed the matter of a thorough revision and recodification of the Rules with a number of practitioners both in Ottawa and Toronto, and there seems to be a general consensus of opinion that the Judges have not the time to do this properly. A Benchers has suggested to the writer that a commission composed of competent practitioners should be appointed to perform this work, and under the circumstances this seems the only thing to be done. Perhaps the general dissatisfaction with the present state of things may induce the Ontario Government to take some action in the matter at the next session of the Legislature, when considering the at present much discussed question of Law Reform.

Since the above was written the Law Society has taken action by appointing a committee to wait on the Attorney-General, and by calling a meeting of delegates from the various Law Associations of the Province to meet this committee to discuss questions of reform in the procedure; so it is to be hoped that the proper revision of the Rules will be one of the matters which will engage their attention.

M. J. GORMAN.

OTTAWA.

EDITORIAL REVIEW.

The Annual Index-Digest.

We beg to call the attention, not only of our subscribers, but others of the profession who do us honour of consulting this Journal, to the Index-Digest for the past year. Since the year 1888 we have presented our subscribers with the only annual Digest published in Canada. We do not content ourselves with merely referring to the notes of cases contained in the Occasional Notes (which, by the way, contain a number of cases not noted or reported elsewhere), but give in the Index-Digest the reference to every report published in Canada save those of the Province of Quebec.

From time to time improvements have been suggested and made. But the last issue contains two improvements, viz., giving the name of each case, and numbering the case, and referring in the cross references to the number. Though brief in form, it is necessarily so ; for it would be impossible to extend the matter without making another volume. As it is, the Index-Digest covers over one hundred pages. Published separately it is sold by the publishers at \$3.00 ; to subscribers to the journal it goes free, as part of the Index. We are happy to say that those who have used it are well satisfied with it as an efficient guide.

The Late Railway Accident.

The late railway accident to the train which was conveying two Judges, two leading members of the Bar, and the Registrar and Stenographer of the Court to Toronto, after the trial of an election case, brought home to most of us the fearful character of such accidents, which we are so prone to look at from a merely critical point of view. To think that a train securely wedged into a snow-bank may at any moment be run into at full speed by another train is not likely to have a sedative effect. The

almost miraculous escape of the Judges and barristers had a relieving effect upon feelings harrowed by the pitiless destruction of the two valuable lives of Mr. Joseph, the Registrar, and Mr. Monahan, the Stenographer.

Mr. Joseph was well known as the joint compiler with Mr. Christopher Robinson, Q.C., of Robinson and Joseph's Digest, the compiler of the Ontario Digest, the editor of the last edition of Harrison's Municipal Manual, and the assistant Law Clerk to the Legislative Assembly of Ontario. Of a most kindly disposition, he will be greatly missed.

Mr. Monahan was a nephew of a late Chief Justice of Ireland, and a man of some attainments. In addition to his short-hand work, he took a great interest in chemistry and metallurgy, and was one of the proprietors of a laboratory in Toronto. He was a great favourite with the profession.

We are happy to learn that Mr. Justice Burton has almost completely recovered from the effects of the accident. Messrs. Osler, Q.C., and Aylesworth, Q.C., received some painful bruises, but recovered rapidly.

It is due to the railway company to say that the Solicitors promptly offered to make compensation to the family of Mr. Monahan, without the necessity of legal proceedings.

Sir Charles Tupper, Q.C.

The Honourable Sir Charles Hibbert Tupper, Q.C., having been appointed to the office of Minister of Justice and Attorney-General of Canada, rendered vacant by the death of the late Sir John Thompson, was called to the Bar of Ontario, at Osgoode Hall, during the past month, and was afterwards entertained by the Benchers at luncheon. Sir Charles is a member of the Bar of Nova Scotia, his native Province, but has been in public life for such a length of time that he has been able to devote but little of his time to practice. As Attorney-General of Canada, and a member of the Bar of Ontario, he is *ex officio* a Bencher of the Law Society.

The Lord Chancellor and Mr. Justice Williams.

The Law Journal, in its recent numbers, devotes a great deal of space to the late unpleasantness occasioned by the contemplated removal of Mr. Justice Williams from the position of winding-up judge to other business. The telegraphic reports of the storm that was raised, and of Lord Herschell's explanation in the House of Lords were necessarily meagre. The real depth to which public feeling was stirred becomes apparent, however, from a perusal of the lengthy extracts made by the Law Journal from the newspaper press.

It appears that Mr. Justice Williams had acquired a reputation as a fearless and drastic administrator of justice in dealing with the winding-up of companies. He was, as the Law Journal remarks, "a terror to slippery speculators in all classes and ranks of society." It appears that as the result of his disposition of the affairs of certain companies Mr. Jabez Balfour became a fugitive from justice, and Mr. Mundella resigned the post of President of the Board of Trade. At this juncture, or shortly afterwards, Mr. Justice Williams was removed from the position of winding-up judge and sent on circuit, Mr. Justice Romer taking his place. Accepting the Lord Chancellor's explanation, in which he acknowledged that "the expediency of a more permanent transfer of winding-up cases had been under consideration," and accepting (as all are glad to be able to do) his Lordship's statement that, before the controversy arose in the press, he had determined to leave matters as they were, still, it must appear to everyone who reads the admittedly true state of facts, that it was a most dangerous and injudicious thing to do, even to suggest the removal of a Judge from the administration of a certain class of cases in which such a prominent person as the President of the Board of Trade had been concerned, and had, in consequence of the decision, felt it incumbent on himself to resign his post.

It was openly alleged that there was friction between the Board of Trade and the learned Judge, and this is now admitted by those who defended the Lord Chancellor's action. But this would appear to be an additional reason for non-interference, even at the cost of some inconvenience elsewhere, if for no other reason than to emphasize the absolute independence of the Judges and their superiority to any influence whatever from the Government. The Lord Chancellor denies that there was any friction between himself and Mr. Justice Williams, but does not deny that there was some friction between the learned Judge and the Board of Trade.

While it must be gratifying to know that the contemplated step was abandoned, it is alarming to think that the Lord Chancellor was on the verge of taking it, and that such a step, even if done with the best and purest of motives, would have been so entirely misunderstood as to have shaken confidence in the administration of justice. One has only to glance at the stormy articles that appeared upon the judge's temporary removal to quicken one's imagination as to what would have been the result had the removal been a permanent one.

The wholesome feature in the whole of the lamentable affair, is the fearlessness with which the press spoke out in condemnation of the removal of a Judge from a position in which he had done the most fearless and effective justice. It does not happen often that the press have any occasion to speak of the administration of justice; but it is a healthy sign that the priceless treasures of independence and courage in the members of the English judiciary are recognized and guarded by the public, and that, although they may not be the subject of everyday comment, when even a suspicion is aroused of their being threatened or jeopardized the whole public are alarmed and openly demand an explanation. It is well to know that the public have not been lulled into a feeling of security and confidence, but are ever on the watch to guard the pure administration of justice from even the slightest breath of suspicion.

BOOK REVIEW.

A Practical Guide to Police Magistrates and Justices of the Peace. With an alphabetical synopsis of the Criminal Law and an analytical index. By JAMES CRANKSHAW, B. C. L., Montreal, Advocate and Revising Barrister; Author of "An Annotated Edition of the Criminal Code of Canada, 1892." Montreal: Whiteford & Theoret. Toronto: The Goodwin Law Book and Publishing Co., 1895.

Mr. Crankshaw is already known as the compiler of an annotated edition of the Criminal Code. In this work, after a short introductory account of the origin of the office of Justices of the Peace, and their mode of appointment, powers, duties and responsibilities, the learned author deals with the parties to crimes, the extent of the law as to time, persons and place, the prosecution of criminals, in which is included the question of jurisdiction, summary proceedings, etc., and devotes very usefully a large space to the analytical index, which in fact is a compressed digest of the Code with useful citations of cases on the various franchises. The work, while necessarily concise in its matter, is in reality very full in its treatment of the whole subject, and is the most complete work of its kind yet published in Canada.

YORK LAW ASSOCIATION REPORT FOR 1894.

The Trustees of the Association submit to the shareholders and members their ninth Annual Report.

There are at present 405 members of the Association, and 348 have paid their fees for the year 1894.

During the year 19 practitioners became members, 5 members died, and 8 members severed their connection with the Association by removal from the county or resignation, and one member, Mr. W. R. Meredith, Q.C., was appointed to the Bench.

An unusual number of members have not paid their annual fees. A list of their names is appended to this Report.

There are now 2,611 volumes in the Library, 209 volumes having been added during the year, made up as follows:—Reports, 102; Texts, Digests and Statutes, 65; bound periodicals, 26; donations, 16. The most important addition during the year comprised 52 volumes of the Law Times Reports, which completed a set of this valuable publication, and 26 volumes of the American and English Encyclopædia of Law. The value of the books in the Library is now estimated as follows:—Reports and Statutes, \$6,517.37; Text books, \$2,339.12; Periodicals, \$1,234.70; total, \$10,091.19. In making this estimate the books are placed at the cost of those which have been purchased, and while there has necessarily been a considerable depreciation in the value of the text books, it is thought that this depreciation is more than counter-balanced by the value of the many donations of books, and the increased value of the periodicals after binding, their value in the above estimate being only placed at the cost of the original annual subscriptions. The work of noting the Reports and Statutes has been continued

during the year, and in consequence the Library has, under the care of the Association's efficient Librarian, become of the highest value to the members.

Following a custom of our past Presidents, a portrait of Mr. Lash, Q.C., President for the year 1893, has been presented to the Association by Mr. Foy, Q.C., the retiring President.

The most important event which has marked the history of the Bar since the last Annual Meeting is the recent Conference of the Legislation Committee of Convocation with the representatives of the County Law Associations of the Province summoned to consider proposed changes in the practice and procedure of the Courts. The County of York Law Association has since its foundation endeavoured to foster and bring about a unity of action of the whole Bar of the Province in urging upon the two Governments wise and necessary changes in the law. It has been difficult to convince the outer Bars that this Association has never had as its object the unnecessary centralizing of business in Toronto. The Trustees have always entertained the opinion that decentralization, in the sense in which it is understood in the sister province of Quebec, is contrary to the interests of suitors and the public, and therefore necessarily contrary to the interests of the whole Bar; but the Trustees of this Association have always been of opinion that in fairness to suitors and the outer Bars a large part of the formal work in litigation should be conducted in the counties where the solicitors on both sides in any litigation reside. The codification and remodelling of rules in 1888 was principally the work of a committee of this Association. The committee having in charge that codification was composed of representatives of all the Associations, but in consequence of the expense to be incurred by other Associations in sending their representatives to Toronto, where the meetings were necessarily held, the work fell principally on the members of this Association, who were members of the Joint Committee. The rules promulgated

in 1887 comprised at the time the best system of procedure in any country where the English system of law prevailed, and have formed a model for many changes in practice and procedure in other provinces. That system went far to meet the desires of the outer Bars in localizing matters of procedure. This Association has, as time passed on, urged upon the Council of Judges other changes, all believed to be in the public interest, and all based on the result of careful consideration and the experience of those best qualified to judge of the necessity for the suggested changes, but these changes have not been adopted or have only been in part adopted, and that without calling on the Trustees for explanations of the requests for the recommended changes resulting often in confusion, as has been pointed out by a member of the Board in a recent number of a legal periodical.

The many alterations and amendments to the Consolidated Rules of 1887 necessitate a reconsolidation, and it is recommended that Convocation be requested to urge the Attorney-General of the Province to secure from the Bar a report similar to that made in 1886, embodying a codification of the rules which would ensure simplicity of procedure and speed in determination of actions. The recent agitation in the press has been conducted, no doubt, in great part, with a political object, and few if any suggestions of value have been made by those who are conducting the agitation which has been marked by much want of knowledge of the true facts. Thus, for example, it has been urged that the Divisional Courts should be abolished as unnecessary appendages, as Courts which form unnecessary appellate tribunals of an intermediate type, which increase the expense of litigation, and delay beyond reason the ultimate awarding of justice to suitors. A reference to the following table will make it perfectly plain how erroneous is this opinion, and will show that the Divisional Courts in the vast majority of cases form the ultimate Court of Appeal:—

Writs issued in the three Divisions of the High Court, 1892, 7,346 ; 1893, 7,002 ; 1894, not ascertainable.

Actions entered for trial in the three divisions, 1892, 1,327 ; 1893, 1,374 ; 1894, not ascertainable.

	1892,	1893,	1894,	Total.
Appeals from trial decisions to				
the Divisional Courts...	157	218	207	582
“ Orders.....	65	86	66	217
“ in other matters.....	77	62	59	198
Total.....	299	366	332	997

APPEALS TO THE COURT OF APPEAL.

From judgments of Divisional				
Courts on appeal from				
trial decisions.....	29	40	48	117
From other decisions of Divi-				
sional Courts.....	11	7	10	28
Direct from trials.....	41	60	44	145
From County Courts.....	42	52	33	127
From Surrogate Courts, Police				
Magistrates, Division				
Courts, etc., etc.....	20	12	17	49
Total.....	143	171	152	466

From this table it appears that during the years 1892, 1893 and 1894, of 582 appeals to the Divisional Court from decisions at trials there were no further appeals from 465 of these decisions.

It would be advisable in the interests of suitors to limit the number of appeals, but any step which will take away the right to appeal to Divisional Courts is not in the interest of suitors. Those courts have, as is apparent from the preceding table, formed important appellate Courts, and the expense of an appeal to a Divisional Court is small.

The Convention which recently met in Toronto will, it is believed, unite in making many valuable suggestions for the simplification of procedure, but above all, the members of this Association are to be congratulated that the proceedings of that Conference have in great part completed the work begun by this Association in bringing

about the most cordial feelings between the outer Bars and the Bar of Toronto. The Trustees of this Association trust that meetings of such a conference may be of annual occurrence in the future.

No action has been taken upon the recommendation contained in last year's report with regard to the early publication of the Provincial Statutes, and the Trustees suggest that Convocation be again requested to invite the attention of the Attorney-General to the delay involved in not printing the Provincial Statutes in the form adopted for the Dominion Statutes. If this were done the subject of complaint could easily be remedied.

In reference to the resolution passed at the last Annual Meeting, referring to the Board the consideration of the question suggesting an increase of the fees payable by law students to the Law Society, the Trustees, after due consideration, came to the conclusion that they could not recommend at the present time any increase in those fees.

The Trustees record the deaths during the year of the following members:— D. McMichael, Q.C., W. A. Reeve, Q.C., (Principal of the Law School), F. P. Henry, John Downey, and A. E. Swartout.

The particulars required by the by-laws accompany this report as follows:—

1. The names of members admitted during the year.
2. The names of members at the date of this report.
3. A list of books added to the library during the year.
4. A detailed statement of the assets and liabilities at the date of this report and of the receipts and disbursements during the year.

The Treasurer's accounts have been duly audited and the report of the auditors will be submitted for your approval.

The Librarian's report on the work of the year is also submitted.

All of which is respectfully submitted.

THE CANADIAN LAW TIMES.

APRIL, 1895.

THE LIBEL ACT OF 1894.

(Concluded.)

SECTION 5 of the Act contains two very important and valuable amendments. The first is with respect to the consolidation of different actions for the same libel. The second is as to the assessment of damages, and the apportionment of costs, in such cases. These may be considered separately. Sub-section one, which relates to consolidation, is as follows:—

“ It shall be competent for a judge of the High Court of Justice upon an application by or on behalf of two or more defendants, in any actions for the same or substantially the same libel, brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together; and after such order has been made, and before the trial of the said actions, the defendants, in any new actions instituted in respect to the same, or substantially the same, libel, shall also be entitled to be joined in a common action upon a joint application being made by such new defendants and the defendants in the actions already consolidated.”

This is a real boon to the newspapers. It is taken from the English Law of Libel Amendment Act, 1888 (*a*), and

(*a*) 51 & 52 Vict. cap. 64, sec.

was intended to prevent a series of separate actions being brought against different newspaper publishers for the same, or substantially the same, libel, and excessive damages being recovered against each.

There are three different kinds of consolidation of actions. One of these is where actions are brought by the same plaintiff against different defendants, but the questions in dispute in all are substantially the same. In cases of this nature the Court, on the application of the defendants, will stay proceedings in all the actions, except one, until that one action, which is the test action, has been determined, upon the terms that the various defendants agree to be bound by the event of the action which proceeds. If, for any reason, the test action has not been fought out, another of the set of actions will, if necessary, be substituted for it (*b*). This practice has been applied to a variety of actions, and, prior to the Act of 1894, was the only practice which could be applied to several actions in respect of publishing the same libel in different newspapers (*c*). The reason was, that as there were distinct and separate publications by the different newspapers, the causes of action, and the liabilities of the various defendants, were different, and there could be no consolidation of the actions. By staying the proceedings, however, in all the actions, except the one test action, the other defendants obtained some relief in regard to costs; but that was the only relief afforded them. If the test action proceeded, and was tried successfully against the defendant, each of the defendants in the other actions was liable for whatever damages the plaintiff recovered in the test action. The result was that the plaintiff frequently obtained heavy damages for what was really the same libel. In *Tucker v. Lawson* (*d*), already referred to, the plaintiff sued twenty-three newspapers for the libel complained of, which had appeared in all of them, and, under the law as

(*b*) *Amos v. Chadwick*, 9 Ch. D. 459.

(*c*) *Colledge v. Pike*, 56 L. T. N. S. 124, *infra*.

(*d*) 2 T. L. R. 593.

it then stood, recovered enormous damages together with the costs of each separate action. The actions were tried successfully at different times and places, but, on the authority of *Creevy v. Carr* (*e*), it was held that the fact that the plaintiff had already sued, or been compensated, for the libel, by other newspaper proprietors, could not be given in evidence by any of the defendants. This state of things prevailed in England until the passing of the Libel Act of 1888, and in Ontario until the passing of the Libel Act of 1894. By this Act any such injustice is rendered impossible, so far as the publishers in this province are concerned. If now a series of actions are brought by the same plaintiff against different newspapers, for the same or substantially the same libel, the defendants may combine their scattered forces, have the actions consolidated, and get them all disposed of at one trial. This will be a great saving of expense, both in damages and costs, and will enable the associated defendants to wage the fight better than if the expense fell on one individually. If a plaintiff should successfully try out one action before commencing another, section 3 will enable the second defendant to prove, in mitigation of damages, that the plaintiff has already received some compensation for the libel. And he may do this in every case where compensation for substantially the same libel has already been made, or agreed to be made, to the plaintiff by some person, although that person may have had no action brought against him.

There are two reported English cases which illustrate the crying evils of the old law, and the benefits effected by its amendment under section 5, sub-section 1, of the new Act. The first of these, *Colledge v. Pike* (*f*), was one of the actions for libel against newspaper proprietors which intensified the agitation in England for reform, and hastened a change in the law. The plaintiff had, at the same time that he sued the defendant Pike, brought a separate action against each of sixteen other defendants

(*e*) 7 C. & P. 64.

(*f*) 56 L. T. N. S. 124 (1886).

for publishing the same libel. The libel was contained in a Central News telegram published in October, 1883, in numerous London and provincial papers. The plaintiff, previously to bringing these seventeen actions, had brought three other actions, one against the "Globe" newspaper, another which included as defendants the proprietors of fifteen other newspapers, and also the Central News Association; and a third action against another newspaper. All these actions were in respect of the same libel. At the trial of the second of these actions it was objected by the judge that the plaintiff had improperly joined too many defendants in one action when the claim against each of them was different; but as the several defendants did not object, the Court permitted the trial to proceed. All the defendants pleaded a justification, and all three actions were tried separately. The pleas of justification failed, and the plaintiff recovered £1,000 damages against the "Globe" newspaper in the first action, £1,500 (being £100 in each case) against the fifteen newspaper proprietors and £500 against the Central News Association, the defendants in the second action, and £100 against the defendant in the third action. The plaintiff had, therefore, already recovered damages to the amount of £3,100 in respect of the same libel for the publication of which he sued the defendant Pike and the sixteen other defendants above mentioned.

Under these circumstances an application was made to the Master in Chambers, on behalf of the defendant Pike and the sixteen other defendants in the actions then pending, for an order that all further proceedings might be stayed in all the actions except the first, viz., Colledge v. Pike—which was to be the test action—until the verdict should be given in that action, the several defendants undertaking to be bound by the verdict in the test action, provided the verdict should be satisfactory to the trial judge.

The Master refused to make any order, and on appeal to Pollock, B., at Chambers, this refusal was confirmed. The defendants then appealed to the Queen's Bench Divi-

sion. The Court refused to make an order to consolidate the actions on the ground that, although the libel was the same in each case, yet the several publications and the circumstances attending them being different, the causes of action in the several cases were different. They made an order, however, that all further proceedings in all the seventeen actions, save one to be selected by the plaintiff, be stayed pending the trial of such selected action, the defendant therein to have seven days' time to deliver his defence after notice to him of such selected action. They further ordered (1) that, if the plaintiff were dissatisfied with the verdict obtained on the trial of the selected action, he should be at liberty to select one other action for trial, the defendant therein having like time after notice to deliver his defence; and (2) that, the defendants undertaking to be bound by the verdict in the first and second selected actions, the plaintiff should be at liberty to sign judgment against the defendants in all the remaining actions for the maximum amount of damages found by the jury.

It is noticeable that, on the argument before the Court, it was contended by defendants' counsel that, the cause of action being the same in all the actions, the libel being one and the same, the actions could be consolidated under Rule 656 of the Supreme Court Rules, 1883, which corresponds with our own Rule 652. To this Huddleston, B., could not agree. He said that the publication and the circumstances attending it might be different in each case. One paper might have insisted on the truth of the libel and made injurious comments on the plaintiff; another might have simply published the libel without remark; another might have inserted an apology; another might have refused to apologise; one paper might have a very large and wide circulation, and another a very limited one, and so on, each case being different from the others. The plaintiff could not, therefore, sue them all collectively, but must sue them individually.

The order made, which was the first order of the kind, was justified by the Court as a

proper exercise of discretion under the circumstances. It secured to the plaintiff his full legal rights, and the power of obtaining ample compensation for his wrongs. On the other hand, it prevented the plaintiff's solicitors from making a market out of his grievances, and protected the defendants against enormously expensive, harassing and unnecessary legal costs. If this were true under the defective procedure prior to the English Libel Act of 1888, how much truer is it now under the more complete and effective system of consolidation and assessment afforded by that statute and adopted by our own Act of 1894?

The case of *Eddison v. Dalziel* (g) is the first reported decision under the section of the English Act corresponding with section 5, sub-section 1, of our own Act. The action was brought by a factory worker in the north of England, who had gone to New York, for a libellous news item telegraphed by Dalziel's News Agency. The item was copied into the "Evening News" and "Post" and the "Bradford Argus." In the case of the first named newspaper the defendants had pleaded an apology and paid two guineas into Court, so that the only issue was as to the sufficiency of that sum as damages. In the other two cases the defendants had pleaded a justification, but they were not ready for trial, as a commission had been ordered to the United States to enable them to prove the justification. An application was made on behalf of all the defendants to consolidate the actions for the purpose of trial. This was opposed on the ground that the enactment only applied to actions that were in the same position. For that reason no objection was offered to consolidating the two actions in which justification was pleaded, because they were in the same plight; but as to the action in which money was paid into Court with an apology, it was objected that it was in a different position, and that the enactment did not apply. In that case, it was argued, the plaintiff was entitled and ready to go to trial on the

(g) 9 T. L. R. 334 (1893).

question of further damages, and he should not be deprived, by an order to consolidate, of his right to try his action without delay at the Leeds Assizes which were then sitting. The Court held that the application for consolidation was reasonable, and that the order must be made with costs.

In the well known suits of *Beaton v. The "Globe" Printing Co.*, and a number of other actions by the same plaintiff against other newspapers for substantially the same libel, an application was made by the defendants to Robertson, J., and granted, for consolidation of the actions under section 5. The reserved judgment, in which the case of *Eddison v. Dalziel*, *supra*, is referred to, was pronounced on 27th March, 1895. It is the first reported decision in our own Courts on this section of the Act.

When the actions have been consolidated and are being tried together, sub-section 2 of section 5 provides for the mode of assessing the damages and apportioning the costs. It enacts that—

“In a consolidated action under this section the jury shall assess the whole amount of the damages, if any, in one sum, but a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately; and if the jury shall have found a verdict against the defendant or defendants, in more than one of the actions so consolidated, they shall proceed to apportion the amount of damages which they shall have so found between and against the said last-mentioned defendants; and the Judge at the trial, in the event of the plaintiff being awarded the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between and against such defendants.”

This sub-section imposes a double duty: Firstly, the jury have to determine (1) who of the defendants, if any, are liable for damages; (2) the total amount of such damages; and (3) the share or proportion of the sum total which each defendant should bear; and Secondly, the

Judge must determine (1) whether any costs should be awarded; and (2), if so, the share or proportion which should be payable by each defendant. For the purpose of fixing the quantum of damages the several actions are treated as one, and a certain sum is named by the jury as the full amount to which the plaintiff is entitled. But for all other purposes the actions are regarded as distinct, and each action must be considered and determined on its individual merits. This necessitates a separate verdict as to each; and, in the event of a verdict against two or more defendants, an apportionment of the damages. The one sub-section is plainly in aid of the other. Without the powers given the jury by sub-section 2, the previous provision as to consolidation would be of comparatively little value. Each defendant would be liable for the whole amount awarded—as in fact he still is in any action not covered by the section—and the degrees of culpability, which in the case of a number of newspapers might be very important, could not be properly measured. The scope and effect of the combined clauses are most salutary. The remedy provided, it will be noticed, is general in its application. It is not confined to actions against newspapers in which “the same, or substantially the same, libel” has appeared, but includes actions against all persons who are amenable to the law for a libel of that character. Reasonable protection is given every defendant without depriving the plaintiff of any legal right to redress. Where a number of newspapers are involved, the damages and costs may be fairly adjusted. The original publishers may be obliged to pay more than the mere copiers, and the papers that gave undue publicity may be made to suffer heavier penalties than those which published the defamatory matter as an ordinary news item without comment. These enactments will also be of service to the press in discouraging actions set on foot for extortionate purposes. These could be multiplied with impunity under the old law. The evil will be diminished under the new Act, but it will never be minimized except by some remedial process *in limine litis*.

The case of *Hopley v. Williams* (*h*) is the first reported case in England which bears on this sub-section. The libel complained of appeared in October, 1886, in the "Worcester Advertiser," and was as follows: "In 1870 Moreton tried his fortune in the United States, whither he was accompanied by a woman known as 'Polly' (the plaintiff), who had passed as his wife in 1885, and who was afterwards said by the police to be a most skilful forger." The "Worcester Chronicle," the "Worcester Echo" and the "Nottingham Daily Express" contained a similar paragraph, but it stated that the woman "is an excellent forger," without the words "the police said." The "Liverpool Daily Post" added—"has been convicted abroad and is an excellent forger." The "Manchester Courier," the "York Herald" and the "Liverpool Courier" each had a similar paragraph to that in the "Worcester Chronicle." The plaintiff claimed damages in separate actions from each of the proprietors of those newspapers, but the actions had been consolidated. The defence was that the plaintiff had suffered no damage, and that the words complained of were a fair and accurate report of a notice issued and published, at the request of the chief constable, for the information of the public, and for the purpose of identifying the said Moreton, and that the publication, being *bona fide* and without malice, was privileged under section 4 of the Libel Act of 1888. The trial judge (Charles, J.) having been asked by counsel for the defence for a ruling on the point, held that the Act was not retrospective, and did not apply to the case, but—as appears from his charge to the jury—that the section as to the apportionment of the damages did apply. The jury returned a verdict of forty shillings, and apportioned five shillings each to be paid by the proprietors of the "Worcester Chronicle" and "Advertiser," the "Worcester Echo" and the "Nottingham Express," twenty-five shillings by the "Liverpool

(*h*) 6 T. L. R. 8 (1889).

Courier," and one farthing against each of the other three defendants.

On the question of the apportionment of costs the learned judge said: "After some hesitation I have come to the conclusion that I must look at this as a whole. It seems to me, in spite of the provisions of section 5" (similarly numbered in our own Act), "I am bound to deal with it under Order 65, Rule 1, of the Judicature Rules, 1883" (which corresponds with our own un-amended Rule 1170). "I think costs ought to follow the event, unless good cause is shown. It has been held that contemptuous damages are good cause, and go a long way to show that the action ought never to have been brought. Here the damages awarded, though not large, are not contemptuous, and the result is, judgment against the four newspaper proprietors among whom the damages were apportioned with costs—costs to be apportioned between them. In each of the other three cases judgment for plaintiff for one farthing, each party to pay their own costs."

In holding, as reported, that the Act was not "retrospective," Mr. Justice Charles must have meant those sections, including section 4, which did not relate to procedure, and which permitted such defences on the merits as could not have been pleaded before in libel actions. The defence under section 4 was one of these. This is evident from the fact that the different actions had been previously consolidated, and from the Judge's direction to the jury to find and apportion the damages in accordance with section 5, which relates to procedure.

It has been held, time and again, that there is no vested right in procedure⁽ⁱ⁾. His holding with "some hesitation" that he must deal with the costs under Order 65, Rule 1, is probably accounted for by the fact that there is no provision in the English Act of 1888 similar to section 8 of our own Act. That section enacts that "all Acts and

(i) *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 69.

parts of Acts, or Rules of Court, or other provisions having the force of law, which are inconsistent with this Act, are repealed so far as the same relate to actions for libels contained in newspapers."

The English Act has no such clause. Order 65, Rule 1, would still be in force, and the costs would follow the event unless good cause were shown. In Ontario the procedure in this respect would be different, and would be regulated by sub-section 2 of section 5 of our own statute.

Section 6. In any action instituted for the publication in a newspaper of any defamatory matter which has been communicated in writing by any person to such newspaper with a view to its publication therein, the defendant may at any stage of the proceedings, upon notice to such person and an affidavit verifying the facts, apply to a Judge in Chambers for an order joining such person as a party defendant in the action, and such person may be so joined on such terms as may appear to be just; and thereafter the defendant in the action, who is charged with the publication in the newspaper of the defamatory matter complained of, may claim in the action against the party so joined as aforesaid any remedy over or relief to which, under the circumstances, he may by law be entitled against such party.

(2) This section shall not apply when the defamatory matter was known by the defendant to be untrue, or was contained in an anonymous communication.

This amendment, which is peculiar to our own law, is designed to give publishers a remedy against persons who communicate defamatory matter to newspapers. There are evil-minded persons in every community who are ready to practice deception in order to ensure publicity to their venom. If the matter be communicated anonymously, the publisher may, of course, disclose the writer's name; but, as a rule, he will not disclose it, and will certainly refuse to do so unless he be held harmless. In *Harle v. Catherall* (j), Martin, B., said that "no blame attached to

the editor for refusing to give the name. Indeed, an editor would be almost mad to do so. He should blame no editor for so refusing." But even divulging the name does not always protect him. In the absence of an agreement to the contrary he is still liable for the publication, and powerless to obtain redress from his correspondent. If, in any case, the person defamed chooses to proceed against the writer, and release the publisher, well and good; but, if not, the publisher has no recourse against the libellous scribe who has involved him in a lawsuit. This is on the well-known principle that there is no contribution amongst joint wrongdoers. Nor has he recourse now, under the second sub-section, if (1) although the communication be signed by the writer's true name, the publisher knew the statements contained in it to be false; or (2) if the communication be anonymous. Where, however, these two elements are wanting, the publisher when sued may claim, in the same action, and at any stage of the action any relief he is entitled to against his correspondent. He may state in an affidavit the facts and circumstances under which he was induced to publish the matter complained of, and, upon due notice to the correspondent, may apply to a Judge in Chambers for an order joining the culprit as a co-defendant in the action. If his claim for relief be well founded, *e.g.*, if his publication of the defamatory matter were induced by deception or misrepresentation on the part of the writer, and he himself had acted *bona fide*, he would be fairly entitled to be indemnified by his co-defendant. Under the old procedure no such relief could be granted against any correspondent, anonymous or otherwise; under this section of the new Act it may be granted in any case not covered by sub-section 2. To this limited extent he may be protected—if his correspondent be a person of substance; otherwise the protection will be *nil*. "A Judge in Chambers," under this section, means a Judge of the High Court in Chambers at Toronto, Ottawa or London. This is an unnecessary restriction, as there is no reason why, in all the outer counties, the motion for joinder should not be disposed of by a local Judge of the

High Court. In other respects the proceedings will be practically the same as in the numerous class of cases in which third parties may be brought in as defendants.

The liability of a third party for causing a libel to be published in a newspaper is not new law. It is an old story, so far at least as the liability of the third party to the person defamed is concerned. Every one who requests, procures or commands another to publish a libel is answerable as though he published it himself. *Qui facit per alium facit per se*. The request need not be express; it may be inferred from the person's conduct in sending his manuscript to the editor, or making a statement to the reporter, of a newspaper, with the knowledge that they will publish it, and without any effort to prevent their so doing. The communication need not be inserted *verbatim*, so long as the sense and substance of it appear in print. This rule of third party liability is familiar law. The rule, however, is new in its application and enforcement by a newspaper publisher who has been ensnared into a libel suit by a third party who cannot justify his defamatory communication.

Sub-section 2 of this section (6) was added on the second reading of the bill. It properly denies the benefits of the first sub-section to a publisher who prints communications which he knows to be false; but the extension of the veto to anonymous communications is a novel exhibition of timidity on the part of the legislature. The hue and cry in the debate on this point strikes one as the least bit hysterical. As it stands, the enactment assumes that all defamatory matter contained in such communications is false, and in effect brands anonymous newspaper literature with a stigma which it does not deserve. Signed communications are the exception, not the rule. The great volume of newspaper writing is anonymous, but the proportion that is defamatory is insignificantly small. Discrimination against anonymity was unnecessary, except to punish, in a sinister sort of way, for adherence to a custom that is universally recognized and, comparatively speak-

ing, rarely abused. The publisher is answerable under any circumstances, whether the libel be anonymous or not. If the libel were written and published under a *nom de plume*, the writer could be unmasked, and necessarily would be, if the publisher claimed indemnity under the first sub-section. This would be the result, in nine cases out of ten, if the second sub-section were entirely eliminated from the statute. The publisher would then, under the first sub-section, be compelled to discover his correspondent, if he wished to get the benefit of its provisions. He could not join the writer of the libel without disclosing his identity. The disclosure once made, either willingly or unwillingly, the plaintiff could claim damages against both writer and publisher. Why, then, the need for this indiscriminate blow at the anonymous in newspapers? Opinions may differ as to anonymity in the press; but anonymity has its virtues, and very frequently an influence for good that is wholly wanting in open and undisguised authorship. At all events, it is rather late in the day for a legislature to stamp it with odium. Our own legislature had much better have conceded the full benefits of the first sub-section, and trusted publishers, as they might well do, to expose an anonymous offender to punishment.

The remaining sections of the Act call for little comment. Section 7 amends the old practice as to appeals against orders granting or refusing security for costs in actions against newspapers. It provides that "an order of a Judge of the High Court granting or refusing security for costs in an action for libel contained in a newspaper, made under section 9 of the Act respecting Actions for Libel and Slander, shall be final and shall not be subject to appeal, and where the order is made by a local Judge, the same may be appealed to a Judge of the High Court sitting in Chambers, and the order made by such High Court Judge shall be final and shall not be subject to any appeal."

The section as originally drafted and printed made orders in such cases by local Judges final, and gave no

appeal therefrom to a Judge of the High Court. As amended in committee such an appeal is provided for; but the appeal is final; and there is no appeal from such an order by a Judge of the High Court in the first instance. The section is fair to both parties, while it ensures the consideration and decision of the matters in question by Judges experienced in, and who alone may try, libel actions. The amendment as a whole removes one of the special grievances of the press.

Sections 8 and 9 have already been noticed. Section 10 enacts that "nothing in this Act contained shall be construed as taking away any right which a newspaper, not published in the Province of Ontario, may have under the Revised Act respecting actions of Libel and Slander and the Act amending the same."

By section 2 of the Act of 1894 the term "newspaper" is restricted to papers "printed for sale and published in the Province of Ontario." The words "in the Province of Ontario" are omitted in the definition contained in section 1 of the Revised Statute. There are many newspapers "printed for sale and published" outside of Ontario, but which are imported into the province and sold by provincial newsdealers. What "rights," under the Revised Act and its amending Act of 1889, these foreign newspapers can be deprived of by the Act of 1894 is not very clear; but whatever "rights" they possessed are retained intact by the above enactment.

J. KING.

EDITORIAL REVIEW.

The Law Courts Act.

The draft of the Attorney-General's proposed bill to "diminish appeals" and "improve the procedure of the Courts" contains some excellent and some execrable features. The abolition of security in appeals to the Court of Appeal is a just and sensible measure. The provision as to security was made when the last appeal, save to the Privy Council, was to the Court of Appeal; but, since the Supreme Court of Canada was constituted and the appeal to the Court of Appeal was made "a step in the cause," the giving of security has become not only anachronistic but unjust. In many, if not most, cases the provisions as to printing and giving security were prohibitory.

We do not hold, however, with those who desire to limit appeals. In proportion to the mass of litigation appeals are few, and it ill becomes appellate Courts (from which we often hear lamentations as to the number of appeals) to deprecate the resort to a common right, when indeed they exist for the purpose of hearing such appeals only. Apart altogether from this, it is an undoubted fact derivable from human experience, that where there is no appeal from an inferior tribunal the law as expressed by such tribunals becomes uncertain, and being uncertain, the administration of justice begets injustice. Both counsel and solicitors are unable to advise, and will always be driven to say, that the result of a case will depend very largely upon the Judge, or Judges, before whom the case is argued. It has always been a crying evil that no appeal lay from a Judge sitting in Court, except to the Court of Appeal, and then only on security being given and all the proceedings printed—consequent delay and, perhaps, irreparable damage ensuing meanwhile. Motions for judg-

ment involving the construction of wills, and motions for injunctions were practically final, unless the party aggrieved could give security. And the absurd rule obtained that a petty Chamber motion could go to a Divisional Court, while a motion originating before or proceeding through a Judge in Court could not.

No doubt the bill will be further considered, and we hope postponed until such consideration can be given to it as such a radical measure deserves. In the meantime, without going into detail, we would point out that the appeal to a Divisional Court from a Judge in Court is substituted for an appeal to the Court of Appeal, and is not made alternative therewith. And appeals from Masters, etc., are made direct to Divisional Courts instead of to a Judge in Court. This will largely increase Divisional Court work, and, in proportion, decrease the work of the weekly Courts.

In appeals to the Court of Appeal, no good reason exists for abolishing the reasons against appeal. The procedure might have been left as before, the security and printing merely being dispensed with.

The provision as to the "effect of judicial decisions" is perhaps one of the most extraordinary that ever appeared in a statute. The rules as to the binding effect of decisions are well understood, and ought not to be interfered with, at any rate without the exercise of the greatest caution. The provision that the decision of a Divisional Court of the Court of Appeal on a question of practice should be binding on the Court, "unless overruled or otherwise impugned by a higher Court," is surely unnecessary. No appeal lies to a higher Court on a question of practice. Is the Court of Appeal in England a "higher Court," or the House of Lords? Neither of them overrule or impugn colonial decisions. Yet our Courts defer to them, and properly so. Was it intended to restrict their powers or enlarge them? As to a question of law, the same remarks are pertinent. But the decision of a Divisional Court of the Court of Appeal is a decision by the Court itself, and it is familiar

law that the Court follows its own decisions, unless it sees good ground to alter them on a change of circumstances, or a fuller discussion in a Court worthy of respect, although technically unable to affect the decision. If it were thought probable that two Divisions of the Court of Appeal might decide a similar point differently, the danger could have been avoided by simply enacting that the decision of a Division of the Court should be deemed the decision of this Court, and leave the unwritten rules as to the binding effect of decisions untouched.

So as to other Courts and Judges and Courts and Judges of co-ordinate jurisdiction. Is a hasty decision to be followed persistently though the whole profession concur in its being wrong? Is one suitor to be condemned because another has been unfortunate? And is this state of affairs to be accentuated by limiting the right of appeal? Better leave severely alone rules which have been built up by a long course of practice than hastily make a new one which may work injustice.

The breaking up of the Divisional Courts is a measure which many think desirable. The simple way of doing it would have been to abolish the Divisions. But, to retain the Divisions, declare that they shall not sit or give judgments "as such Divisions," and leave the Judges to arrange their sittings amongst themselves, so that the Judges of a Division may sit as a Divisional Court, but not "as such Division," is surely absurd. It involves merely a formal change in the entitling of an order of the Court. The provision requiring a Divisional Court to sit once a month is a measure that was mooted when the rules were revised in 1888, and one that we have constantly advocated in this journal. A great deal of interlocutory business was never done for the reason that the sittings of the Divisional Courts were so far apart.

The privilege, or supposed privilege, granted to solicitors to make agreements with clients for remuneration by commission, gross sum, or salary is on its face delusive. It is true that such agreements are to be dealt with, "sued

and recovered on or impeached and set aside, in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor." But what does this mean? Does it mean that such agreements are to be regarded as if the solicitor and client dealing together are to be treated as on equal terms? Or does it mean that such agreements are to be treated as similar agreements between other persons occupying similar relationships though not for the remuneration of a solicitor? Is the solicitor always to be kept in the position of a person better able to make a bargain than his client? It would seem so; for in the following clause the solicitor is liable to have his agreement cancelled or the amount reduced, if the taxing officer shall find it "unfair and unreasonable." We all know what would be the fate of every such agreement if the client objected to carry it out.

The provisions of the bill as to fixing a limit for counsel fees is equally objectionable, but from the clients' point of view. It is quite possible, of course, to fix a limit beyond which a solicitor is not entitled to go in retaining counsel, but there is no possibility of compelling counsel to act for the fee offered. The result, instead of being beneficial to suitors, will be detrimental. Counsel can no longer rely on a solicitor's credit, for he cannot bind his client. And the consequence will be that in every case where the client is not directly in contact with his counsel the latter will have to insist upon a fee with the brief. The solicitor may recover the fee from his client if it has been paid, "or has been agreed to in writing," whatever that means. No clue is given as to who is to make the "agreement in writing"—whether it is to be between solicitor and client or solicitor and counsel.

A great many smaller matters are dealt with by the bill; but, as we said before, it is to be hoped that the bill will receive a good deal of consideration before it is proceeded with, in order that the effect of its proposed radical changes may be well understood.

An Advertising Judge.

A Judge lately appointed to an inferior Court in Ontario, presents a card in several newspapers, in which he says :—" Mr. —, barrister, having just been called to the Bench, desires to offer his most sincere thanks to his numerous clients, and at the same time to announce to them that Mr. —, barrister, has been chosen as his successor, and entrusted with the settlement of all business now in his hands. The Judge invites his clients to continue their patronage to his successor, whose legal acquirements and aptitude are a sure guarantee of satisfaction to all. Mr. — keeps his office at the corner of — and — streets." The "successor" is not a solicitor, though he practises as one. Here is a case for the Discipline Committee. As for M. le Juge, the Law Society cannot reach him, but suitors had better beware how they employ any one but his "successor."

The Supreme Court of Canada.

It is always a disagreeable thing to criticise a Court, but at the same time it is a deplorable thing that the Court should be open to criticism. It not infrequently happens that members of the Bar have to submit to personal inconvenience on account solely of the habit of a particular Judge; but without exception, we think, they do so uncomplainingly. We know of no instance in this Province in which a member of the Bar has not, when the occasion arose, sacrificed his own personal convenience to that of the Court. At the same time, perhaps we are not going wrong in saying that in no instance has a member of the Bar in this Province ever knowingly sacrificed the welfare or rights of his client when they have been jeopardized.

If the convenience of the Bar were alone at stake, we might well pass over an occasional bit of friction in the Supreme Court, though protesting in the name of an independent Bar against any invasion of its rights or privileges. But if the interests of suitors are in the

slightest degree imperilled, or if the confidence of the public in the Court is in the slightest degree impaired or even shaken, we hold it to be the sacred duty of the Bar to endeavour, as far as they can, respectfully to call attention to the danger.

It is an open and unfortunately much discussed fact, that in our highest Court the interruptions of counsel in the course of an argument are so frequent, and of such a character, that unless the counsel engaged has unusual courage, determination and skill, his argument may never be fairly presented to the Court. Overlooking entirely the inconvenience to counsel and to those members of the Court who deferentially listen to the arguments, and the enormous waste of time, it is an undoubted injury to suitors that their cases should have to be so presented in their last Court of Appeal.

Another great inconvenience to counsel and injury of a like kind to suitors is the attempt which the Chief Justice makes to prevent the reading of passages from the reports, and the reading of excerpts from the evidence. As a rule, the counsel engaged are men of some experience, who are not likely to abuse their rights and privileges, even if their other engagements would permit of their wasting time by unnecessarily reading long extracts.

We pass by (with a lament) the fact that conversations upon the bench, in a tone loud enough to be heard at the back of the court room, on subjects entirely foreign to the arguments, are of great frequency. It is a pure question of courtesy to the Bar, and we are not complaining on that score as long as the interests of suitors are protected. But when three out of five Judges engage in earnest conversation, it becomes the duty of counsel to be silent until the Court is again properly constituted to hear the argument.

All these matters are most unpleasant to the counsel engaged before the Court, and tend to shake public confidence in the Court. It has unfortunately become such a common subject of conversation when the Court is sitting that it is impossible not to notice it.

Another matter of very grave import is the manner in which cases are struck out of the list.

If it should so happen the counsel for the appellant should not be on the spot at the moment when a case is called, the case is struck off the list, and if the terms upon which it should be restored cannot be agreed upon, it remains unheard or dismissed. Baldly stated, that a suitor's interests should be completely overlooked, or dealt with to his detriment, without a word being said in his behalf on the merits of his case, and solely because some formality is placed higher in the scale than justice itself, the proposition is so startling that one can hardly credit its existence. If it had not actually occurred it would have been incredible. A Court sits to hear and adjudicate in the most solemn manner on sacred rights and obligations. Everything should give way before the endeavour to get at the truth and justice of the case. Public confidence is completely lost when it becomes known, that the order in which the cases are to proceed is of much more importance than the cases themselves; that a man's fortune may be handed to another because Mr. A. or Mr. B., his counsel, was in the library or five minutes' walk from the Court room when the case was called. It is to be hoped that public confidence will be restored, and that speedily, by a return to the normal method of holding Court and disposing of cases.

BOOK REVIEW.

The Reports, 1894. We have received *The Reports* for 1894, and are happy to say that, notwithstanding the fact that Sir Frederick Pollock has been induced to accept the editorship of the *Law Reports*, they fully maintain the reputation which they at once acquired on publication. A careful comparison of the cases reported in 1894 with those reported in the *Law Reports* shows that no less than 140 cases are reported in *The Reports* which are not to be found in the *Law Reports*; while 40 cases not to be found in *The Reports* are published in the *Law Reports*. The head notes are still excellent in style and substance.

CORRESPONDENCE.

Powers of Sale Without Notice (A Reply).

To the Editor of THE CANADIAN LAW TIMES:

Whatever may be thought of the merits of the controversy respecting powers of sale without notice, practitioners may well feel obliged to Mr. Betts for the trouble he has taken, in the January and February numbers of THE CANADIAN LAW TIMES, to elucidate the subject and to support these rather rickety powers. I fear he has not altogether succeeded. He is unable to point to a single case in which either of the objections stated in my article was even raised, except *Miller v. Cook*, L. R. 20 Eq. 641 (where a power of sale without notice was held to be oppressive, and relief was granted), nor to one in which such a power of sale, when exercised according to its tenor, was upheld.

There was a time, as Mr. Betts shows, when powers of sale of any kind were discountenanced by Courts of Equity, because such powers were thought to be inequitable; later on these Courts relaxed their principles to the extent of recognizing the ordinary power of sale, that is to say, a power to be exercised only after reasonable notice to the mortgagor.

Upon making this discovery, Mr. Betts triumphantly asks: "In what position, then, is Mr. Galt to adduce as a fatal argument against powers of sale without notice, a case which, at the time of its decision, was equally fatal to powers of sale with notice?" I reply that, on his own

showing, I am in the position of one who relies upon a case which decided two points. One of them has been overruled, but my contention is based upon the other.

As a matter of fact, the case alluded to, *Toomes v. Conset*, 3 Atk. 261, had nothing to do with powers of sale, but with certain other stipulations in the mortgage, which "put the borrower too much in the power of the lender."

It is difficult to see how Mr. Betts formed the impression that I "treat the exercise of a power of sale as though it were in fact equivalent to a foreclosure," as the subject of foreclosure was foreign to my enquiry, and was not touched upon in the article. But my learned friend is on the scent, and by pursuing it a little further he will reach the more accurate proposition, that "the exercise of a power of sale without notice according to its tenor is in fact equivalent to a foreclosure without notice." To the man whose lands have been sold behind his back for the bare amount of the mortgage, or whose equity of redemption has been foreclosed, it does not matter much what you call the process. The net result to him in either case is the same. And if there be a surplus after sale, it belongs to the mortgagor, not by virtue of his equity of redemption, as Mr. Betts would have us believe, but because the terms of the mortgage expressly so provide. On a former occasion, 14 C. L. T. 51, I ventured to suggest, as an additional objection to these powers of sale without notice, that the mortgagee occupied the position of trustee *quoad* the exercise of his power of sale, and that the want of notice to his *cestui que trust* (the mortgagor) would invalidate the sale. No one can say that, in dealing with this branch of the question, Mr. Betts has failed "to look beneath the surface." But he has failed to do what is equally important, namely, to notice what is in truth on the surface. The first thing to be done towards ascertaining the mortgagee's position is to take a look at the mortgage. The ordinary Short Form power of sale provides, in Column Two, that the mortgagee shall hold the proceeds of a sale "upon trust in the first place" to

pay the costs of the sale and to satisfy the mortgage money, and then "upon this further trust" to pay the surplus to the mortgagor, etc. With these words before us, it is surely unnecessary to enquire to what extent, in England and elsewhere, a mortgagee may, or may not, be properly styled a trustee. Under our Statute, and for the purpose of the point under discussion, he is not only a trustee, but *an express trustee*. This of itself distinguishes the position of a mortgagee here from that of the mortgagee in *Re Anonymous*, 6 Mad. 10. But, besides this, it is to be remarked that the report does not confirm Mr. Betts's statement that the power of sale was "without notice."

A power of sale without notice might doubtless be framed in such terms as to exclude the relationship above mentioned. Such an attempt, however, to shackle the mortgagor, in the face of the protection afforded by the present statutory form, would only add another objection to these powers. I have taken a dip in "the current of authority countenancing powers of sale without notice" as indicated by Mr. Betts; but I cannot agree with him in calling it "strong and ample." The cases cited in Bythewood all relate to obtaining the concurrence of the mortgagor in the sale, and do not touch the question of sale without notice. The dictum on this latter point is *vox et præterea nihil*; and the same may be said of the other authorities referred to.

The cases in our own Courts establish that a power of sale without notice (which can only be impeached on equitable grounds) cannot be impeached by any one who has in fact been duly notified. His equitable objection to the power is displaced by an equitable answer. This was the state of facts with which Mr. Justice Street had to deal in Ray's case; and when Mr. Betts says he prefers to understand the learned Judge "as meaning simply what he says, and not as merely hanging out false lights to confuse any unfortunate practitioner who may endeavour

to ascertain the state of the law upon the subject from the decided cases," he makes a judgment on one state of facts do duty as a decided case upon a totally different state of facts.

To "work the oracle" after this fashion, in these prosaic days, must surely be a vain effort, for the only response which can be got is easily recognized to be but the echo of the devotee's own voice.

Veneration for decided cases cannot justify idol worship. Similarly with respect to Statutes. It is one thing for the Legislature to provide protection against irregularities for a purchaser under an ordinary power of sale with notice reserving (as the Statute cited by Mr. Betts reserves) a right of action by the person aggrieved against the person selling in case no notice is given; it is quite another to authorize an extraordinary power of sale without notice, with no reservation of rights against anybody.

There is nothing contradictory in the two statements quoted by Mr. Betts on pp. 15 and 16, but he misunderstands one of them. When I said "A reporter would indeed show rash enthusiasm in detailing facts upon which neither counsel nor Court relied," I merely hinted that if one wishes to see exactly how much or how little a case decides, he must sometimes look outside the report, and examine the papers in the action, a course which I adopted with *Barry v. Anderson*.

But suppose that a mortgagee, acting according to the tenor of his power, proceeds to sell without giving notice. This is the supposition discussed in my former paper. Mr. Betts candidly admits that such a man "would, whatever might be the legal or equitable aspect of his conduct, be undoubtedly guilty of distinct moral turpitude." But moral turpitude, according to an authority cited by Mr. Betts (*Taylor's Equity*, sec. 213), is one of those things which, when found in the consideration, avoid a contract. Can it be that conduct so characterized is insufficient to stay the Court in enforcing a contract?

In conclusion, let me say that I have no bias against mortgagees, whose position is rather enviable than otherwise. It cannot fairly be said that by pointing out a pitfall to a man you thereby do him an injustice. And, so far from having any misdirected sympathy with convicted murderers, I would have justice meted out to all these people, whether mortgagors, mortgagees, or murderers, simply *in accordance with their deeds*.

Yours, etc.,

A. C. GALT.

THE CANADIAN LAW TIMES.

MAY, 1895.

LIABILITY FOR INJURIES CAUSING DEATH.

IN the recent case of *Walkerton v. Erdman* (a) Mr. Justice Gwynne says: "Upon the authority of the recent cases, and especially since the judgment of the Privy Council in *Robinson v. Canadian Pacific Railway Company* (b) it cannot be disputed in this Court that the present action at the suit of the widow of the deceased John B. Erdman is a wholly different action in every particular from that instituted by Erdman in his lifetime. Although the plaintiff is personal representative of the deceased, she claims not in right of the deceased or of his estate, but being personal representative she is by statute authorized in that character to assert her own independent rights and those of her children."

Notwithstanding the very high authority of the very learned Judge whose language is quoted, it may be doubted whether the proposition he lays down is quite as indisputable as he assumes it to be.

The question in *Walkerton v. Erdman* was whether evidence taken *de bene esse* in the suit brought by the deceased husband of the plaintiff could be read in the action subsequently brought by his administratrix under Lord Campbell's Act against the same defendants in respect of

(a) 23 S. C. R. 352.

(b) 1892, A. C. 481.

the death of her husband resulting from the same injury as was the subject of the husband's action. The majority of the Supreme Court held that it could; Taschereau and Gwynne, JJ., dissenting; and in order to arrive at that conclusion they virtually held that the subject matter of the action in both cases was the same.

Mr. Justice Gwynne's remarks above quoted are therefore those of a Judge who dissented from the conclusion of the majority of the Court, and can therefore only be said to be a dictum, but it is a view which was concurred in by King, J., who agreed with the majority, and it may therefore be useful to consider whether or not the opinion thus expressed is really supported either by authority or principle, because it seems to involve a further question, viz., whether the effect of Lord Campbell's Act is to make a wrongdoer doubly liable in damages for the wrongful act.

It must be admitted that somewhat conflicting judicial opinions upon the point have been from time to time expressed. That very eminent Judge, Lord Blackburn, in *Read v. Great Eastern Railway Co. (c)*, speaking of Lord Campbell's Act, said: "This section may provide a new principle as to the assessment of damages, but it does not give any new right of action." But, in a later case, the same *(d)* learned Judge at p. 70 said: "Before Lord Campbell's Act, where a person had been injured from any of the causes mentioned in the first section of that Act and had died, the maxim *actio personalis moritur cum persona* applied. He could not sue, for he was dead, and it did not survive to anybody whomsoever to sue for the damages occasioned by the accident which had caused injury to him, resulting in death. That, Lord Campbell, or rather the Legislature at the instance of Lord Campbell, thought fit to alter; and I think when that Act is looked at it is plain enough that if a person dies under the circumstances mentioned when he might have maintained an

(c) L. R. 3 Q.B. 555.

(d) *Seward v. The Vera Cruz*, 10 App. Cas. 59.

action if it had been for an injury to himself which he had survived, a *totally new action* is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym v. Great Northern Railway Co. (e)*, is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of widow, parent, or child, who under the circumstances suffers pecuniary loss by the death."

And in the same case Lord Selborne said: "Lord Campbell's Act *gives a new cause of action* clearly, and does not merely remove the operation of the maxim *actio personalis moritur cum persona*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of the executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime; *but death is essentially the cause of the action*, an action which he never could have brought under any circumstances which, if he had been living, would have given him for an injury short of death which he might have sustained, a right of action which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various ways."

This passage is cited as it is given in the report, but the concluding sentences appear somewhat disconnected, and one would imagine that the judgment must have been delivered extemporaneously and that the shorthand reporter has failed to get the exact words used.

In an earlier case of *Pym v. The Great Northern Railway Co. (f)* in the Exchequer Chamber, Chief Justice

(e) 2 B. & S. 759; 4 B. & S. 396.

(f) 4 B. & S. 396.

Erle, in giving the judgment of the Court, said, speaking of Lord Campbell's Act: "The statute, as appears to me, gives the personal representative a cause of action beyond that which the deceased would have if he survived, and based on a different principle. This was decided in the cases that have been referred to, *Franklin v. The South Eastern Railway* (g) in the Exchequer and *Dalton v. The South Eastern Railway*" (h). Those cases, however, merely deal with the measure of damages.

The above *dicta* are quoted because they seem to furnish the principal ground in favour of the view of Mr. Justice Gwynne, but when critically examined they are quite inconclusive for the purpose, for none of them were actually necessary for the decision of the point in controversy, and they are therefore *obiter dicta*; and furthermore, all that is said by these learned Judges really only goes to the question of damages, and the person entitled to sue, as we shall endeavour to show, and though they talk of a new right of action, and a new cause of action, yet the *delictum* which gives rise to the liability of the defendant is undoubtedly one and the same whether the action be brought by the person actually injured or his representative. In considering the bearing of these observations on the law of Ontario, it is necessary to bear in mind that it differs from that of England in an important particular. In England the maxim *actio personalis moritur cum persona* has still vitality, whereas in Ontario it has been almost abrogated. By R. S. O. c. 110, s. 9, "The executors or administrators of any deceased person may maintain an action *for all torts or injuries to the person* or to the real or personal estate of the deceased, except in cases of libel and slander, in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased; but action shall be brought within one year after his decease."

(g) 3 H. & N. 211.

(h) 4 C. B. N. S. 296.

It has been recently decided that the effect of this section is not only to enable the personal representatives to bring an action, but also to continue one which has been commenced by the deceased during his lifetime (*i*). So that now, theoretically, a man may sue for damages for causing his death.

If the view of Mr. Justice Gwynne be correct, therefore, there would seem to be a right of action in the personal representatives to bring or continue an action for damages for personal injury to their deceased testator or intestate resulting in his death, the damages recoverable in which would form part of the personal estate; and also a right of action on behalf of the widow, parent or child of the deceased to recover damages for their benefit in respect of the same wrongful act. In other words, contrary to the well-known maxim, "*Nemo debet bis vexari pro una et eadem causa*," it may be possible under the statutes we have referred to, twice to vex a defendant in respect of the same cause.

In *Read v. Great Eastern Railway Co.* (*j*), Lush, J., says: "The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim, *actio personalis*, etc., would have applied." And in that case it was held that accord and satisfaction made to the deceased in his lifetime was a bar to an action by his representatives under Lord Campbell's Act.

It is quite possible that there may be this double right of action by virtue of the statutes above referred to, but on principle it seems a right that Courts of law should be very slow to concede unless it is very clearly and plainly given. If there be any doubt in the matter the question should be decided rather against than in favour of any such contention.

(*i*) *Mason v. Peterborough*, 22 App. R. 683.

(*j*) 1. R. 3 Q. B. 558.

In determining whether this double right does exist, material assistance may be derived from the decision of the House of Lords in a Scotch case, to be presently noticed. First of all, premising that Scotch cases are recognized as authorities in England where the law is common to England and Scotland (*k*). In the present case the law of Scotland seems practically the same as that of Ontario, though it differs from that of England; and if the similarity of the law of Scotland and Ontario is as close as we think it is, then the Scotch case of *Wood v. Gray* (*l*) would seem to be an authority in Ontario.

We gather from *Wood v. Gray* that under the Scotch law an action for personal injury survives to the personal representative of a deceased plaintiff, in which respect it agrees with the law of Ontario under R. S. O. c. 110, s. 9, though it differs from that of England in that respect. Secondly, that although in Scotland Lord Campbell's Act has no application, yet by the Scotch common law a similar right is given to the husband, father, wife, mother or child of the deceased, in which respect the law of Scotland also agrees with the law of Ontario under Lord Campbell's Act (R. S. O. c. 135), because, for this purpose, it is immaterial whether the right, if it exist, be a common law or statutory one. Now, let us consider what was the effect of the decision in *Wood v. Gray*. In that case one Alexander Darling had commenced an action against the defendants to recover damages for personal injuries sustained by him through their alleged wrongful act; he died *pendente lite*; his mother, as his administratrix, revived and continued that suit, and also brought the action of *Wood v. Gray* in her own right, and it was held by the House of Lords that the second action for the same wrongful act would not lie, as being contrary to the maxim *nemo debet bis vexari*, etc.

This appears to be a strong authority in favour of the view that under our Acts there is no double remedy.

(*k*) See *Blake v. Midland Railway Co.*, 18 Q. B. 93.

(*l*) 1892, A. C. 576.

The language of Lords Selborne and Blackburn in *Seward v. Vera Cruz* and of Erle, C.J., in *Pym v. The Great Northern Railway*, which has been quoted, seems to treat "the cause of action," "the damages to be recovered" and "the person entitled to sue" as convertible terms, which they are not. If we consider what is the real foundation of the action either by the person injured, or by his representatives in the event of his death, it is clearly the wrongful act of the defendants, that wrongful act remains the same, whether its results are or are not fatal to the person injured. His death has simply the effect of altering the measure of damages and of vesting the right to sue for those damages in other parties. In certain circumstances the representatives of the person injured are entitled to recover the damages arising to them from that injury, but their right to sue is dependent on the fact whether the injured person could have himself sued in respect of the wrongful act. Lord Selborne, in the passage we have cited, seems to intimate that the right of the representatives to sue is independent of the right of the deceased, but it must be remembered that Lord Campbell's Act (see R. S. O. c. 135, s. 2) is worded as follows: "Where the death of a person has been caused by such wrongful act as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages," etc. For what? The obvious answer is, "the wrongful act," previously spoken of. So that the right of the deceased to maintain an action for "the wrongful act" is made the very foundation of his representatives' right to do so in case of his death, and in case he could not have done so, neither can they. So that in both cases, whether the action be brought by the injured person or by his representatives, "the subject matter of the action" is really the same, viz., "the wrongful act," though it must be admitted that the measure of damages recoverable is different. Consistent with this view are the decisions in which it has been held that accord and satis-

faction made to the deceased for the injury complained of is a bar to an action by his representatives: *Read v. Great Eastern Railway Co. supra*; and that where the deceased has precluded himself by contract from the right of action for the injury complained of, that is also a bar to an action by his representatives (*m*); so also that contributory negligence of the deceased is an answer to an action by his representatives (*n*). If the somewhat incoherent language the reporter has attributed to Lord Selborne in *Seward v. Vera Cruz* means that the right of action of the representatives could not be barred by the conduct of the deceased, then it appears to us that that proposition is neither borne out by the statute nor by the decisions we have referred to, which have never been overruled and must therefore still be taken to be law.

But there is another section of Lord Campbell's Act which has also an important bearing on the point under consideration, and that is the 5th. This enacts that "Not more than one action shall lie for and in respect of the same subject matter of complaint; and every such action shall be commenced within twelve months after the death of the deceased person." No doubt this section *prima facie* applies to actions by the beneficiaries under the Act, and is intended to prevent a multiplicity of actions on their behalf, but is it not also legitimately susceptible of a wider meaning and one that would prevent an action being brought by the representatives when an action had already been brought and prosecuted to judgment by the deceased in his lifetime? If *Read v. The Great Eastern Railway, supra*, be good law, then it must follow as a necessary consequence from it, that a judgment recovered by the deceased, in respect of the wrongful act, is an action in respect of "the same subject matter," and therefore a bar to an action by his representatives; and this contention is aided by the words of section 2, because it seems clear that the deceased having once recovered

(*m*) *Griffiths v. Dudley*, 9 Q. B. D. 357.

(*n*) *Waite v. North Eastern Railway*, El. Bl. & El. 728.

damages for the wrongful act would be debarred from bringing another action, and therefore the condition on which the liability of the wrong doer to the representatives of the deceased is based would not in that event exist. And the same conclusion follows even though the action of the deceased has failed; it is equally a bar to any further action unless, notwithstanding the failure, the deceased could himself have brought another action. But the concluding words of section 5 must not be overlooked—"and every such action shall be commenced within twelve months after the death of the deceased person." It may be argued that these words clearly and by necessary implication confine the previous words of the section to actions brought by the representatives under the Act and cannot refer to actions brought by injured persons in their lifetime. But it is submitted that the proper construction of those words is, "Every such action, when brought under the provisions of this Act," etc., which latter words are to be understood, and by supplying which this section is made harmonious with the second section.

A "cause of action" has, we believe, been defined to mean "all those facts and circumstances which it is necessary for a plaintiff to prove in order to maintain his action." But this seems a somewhat wide definition. According to it not only the original wrongful act, but the death of the injured party, and the status of the plaintiff as being within the class of persons entitled to maintain an action under Lord Campbell's Act, and the proof of pecuniary loss to him, constitute the "cause of action" under that Act, and if that is what is meant by the term the "cause of action" under that Act, it must be admitted that it differs from the cause of action which the deceased was entitled to in his lifetime. But when we come to consider what is the real essential fact which constitutes the ground of the defendant's liability, whether the action be brought by the injured person, or his representatives, we find that it is "the wrongful act" that

occasioned the injury, and all the other facts and circumstances merely affect the *quantum* of damages, or the person to whom such damages are payable. The "cause of action," therefore, in this sense is essentially the same no matter by whom the action is brought or what the *quantum* of damages recoverable may be.

It has been decided that a recovery of damages under Lord Campbell's Act is no bar to an action for damages resulting to a deceased person's estate from the same wrongful act (*o*); and when damage to goods and injury to the person are caused by the same wrongful act a recovery for the damage to goods is no bar to a subsequent action for the injury to the person (*p*). That is because the injury to the goods and the injury to the person are two distinct causes of action though occasioned by one and the same wrongful act. And it has also been decided that in the case of a wrongful act causing damage to property a fresh action may be brought so often as any fresh damage arises (*q*), and it may be argued that giving an injured person a right of action for the injury he sustains and also another right of action to his representatives for the further damage resulting to them from his death in consequence of the same injury, is in accordance with the principle of this class of cases. But there is a very material and well defined difference between actions for damages for injury to the person and actions for damages for injury to property.

No case can be found where a second action for injury to the person has been held to be maintainable because further damage has accrued after judgment. And it is not possible to contend consistently with the authorities that if a man receives an injury to his eye from the negligence of another, he can sue and recover damages for the loss of sight say for six months, and then on subse-

(*o*) *Leggott v. Great Northern Railway*, 1 Q. B. D. 599.

(*p*) *Brunsdon v. Humphrey*, 14 Q. B. D. 141.

(*q*) *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127; *Crumbie v. Wallsend* (1891), 1 Q. B. 503.

quently losing the sight of his eye altogether in consequence of the injury, may sue again and recover further damages.

Such an action has so far never been successfully maintained, though such a state of facts must have often occurred. In such actions the rule is that damages must be assessed once for all, and a recovery in one action may be pleaded as *res judicata* to any further action brought by the same party or his representative in respect of the same tortious act (*r*). But, as has been already pointed out, the second section of Lord Campbell's Act makes the liability of the wrong doer under that Act depend on whether or not an action for the same wrongful act could be brought by the deceased, and if he is barred by *res judicata* at the time of his death, it seems clear that there is then no right of action in his representatives under the Act. This, therefore, seems to be another indication that the Act is not intended to create a double liability, but merely to transfer to the representatives of a deceased person a right to recover only in case the deceased shall not himself have recovered damages in his lifetime.

But there remains to be considered the case of *Robinson v. The Canadian Pacific Railway Company* (*s*), which is said to have conclusively determined the point in question. This was an action brought in the Province of Quebec under a provision of the Code Civile, s. 1056, which is somewhat, though not quite, analogous to Lord Campbell's Act. That section enables suit to be brought where the deceased has died "without having obtained indemnity or satisfaction" within a year after his death by his consort and ascendant or descendant relations to recover damages occasioned by his death. The Code contains no limitation of the right of action, such as is contained in Lord Campbell's Act, to the effect that the deceased must himself have been entitled to maintain the action if living.

(*r*) *Fetter v. Beale*, 1 Salk 11; 1 Ld. Raym. 339.

(*s*) 1892, A. C. 481.

As a matter of fact in Robinson's case the deceased was at the time of his death barred by the lapse of time of all right to bring an action, and the question before the Judicial Committee of the Privy Council was whether the fact that the deceased was barred of the right of action operated as a bar also to his relations' action, which was commenced within a year of his decease. The Judicial Committee decided that it did not, but the *ratio decidendi* appears to have been that s. 1056 of the Code laid down the conditions on which the action might be brought by the relations and that it was not proper to import into that section of the Code any other conditions. At p. 487 Lord Watson, who delivered the judgment, says: "In so far as they bear on the present question, the terms of s. 1056 appear to their Lordships to differ substantially from the provisions of Lord Campbell's Act and of the Provincial Statute of 1859. The Code ignores the representatives of the injured person and gives a direct right of action to his widow and relations—a change calculated to suggest that these parties are to have an independent and not a representative right. A difference of much greater importance is to be found in the fact that the Code distinctly specifies certain conditions affecting the right of action competent to the deceased, which are also to operate as a bar against any suit at the instance of his widow and his ascendant or descendant relations after his death. These conditions are not expressed in either of the statutes referred to, and according to a well-known canon of construction it must be taken that they were inserted for the purpose of making it clear that no conditions affecting the personal claim of the deceased, other than those specified, are to stand in the way of the statutory right conferred upon his widow and relatives. . . . The prescription established by s. 2262 (2) had cut off the deceased's right of action in August, 1883; but the Code does not make it a condition of the right of action given to the appellant by s. 1056 that her husband's right shall not have been prescribed."

This reasoning, though it may be applicable to the question of prescription under Lord Campbell's Act, as to which, however, there may well be a question, seems by no means conclusive of the other question we have been considering. It is true that he says that the widow and relations have an independent right of action and not a representative right, but why? Because the personal representative of the deceased is "ignored," but that is a reason which does not apply under Lord Campbell's Act where the personal representative is not ignored. But, at any rate, the Committee does not attribute any particular weight to that point. The real ground of the decision is obviously to be found in the passage which follows.

Actions in respect of the death of a person by a duel stand on a distinct footing, as to them there would be no right of action on the part of the deceased. They are governed by section 4 of Lord Campbell's Act, and as to them undoubtedly a new and independent right of action is created by the Act, but as to all that class of actions governed by section 2, whose foundation is the right of the deceased to have maintained an action, it is submitted with all possible deference that the right conclusion is that the action, though brought by the representatives, is practically the same cause of action as in his lifetime was vested in the deceased.

In *Erdman v. Walkerton* the action commenced by the deceased might, under R. S. O. c. 110, s. 9, have been continued by his executors, in which case the difficulty which arose in the second action on the question of evidence would have been obviated; but that action having been neither prosecuted to judgment in the lifetime of the deceased, nor revived by his personal representative, constituted no bar to the second action by his representative; but, according to *Wood v. Gray*, if the personal representative had revived the first action it might have prevented the bringing of the second action altogether.

But let us suppose that an action is brought by a deceased person to recover damages for a personal injury.

and that he dies *pendente lite*, and his personal representatives thereupon bring a new action, as was done in *Erdman v. Walkerton*, and let us assume that this second action is prosecuted to judgment, would it thereafter be practicable for the personal representative to take up and continue the action commenced by the deceased and recover further damages in that action for the benefit of the deceased's personal estate? It is submitted that it would not, because the judgment in the second action would be a bar to the further prosecution of the first; for the judgment in the second action would be one between the same parties and for the same subject matter. Another question will sooner or later arise as to whether a personal representative can in continuing an action begun by a deceased, recover therein both damages for the personal estate of the estate of the deceased, under R. S. O. c. 110, s. 9, and also for the benefit of those entitled under Lord Campbell's Act. It is possible that he could do so, but the damages, if any, recoverable in that case for the benefit of the personal estate would probably be confined simply to those damages which the estate had actually sustained. But on the other hand it might be argued, with considerable reason, that the personal representative by continuing the action brought by the deceased would be confined in that action to the recovery of such damages as the deceased would have been entitled to recover; that the action, notwithstanding his death, continues in point of law the action of the deceased; that the judgment recovered therein relates back to the commencement of the action, and therefore if prosecuted with effect such an action is a bar to any further action or the recovery of any damages by or on behalf of persons entitled under Lord Campbell's Act.

It must be noticed that section 7 of Lord Campbell's Act, which enables the parties beneficially interested under that Act to sue in their own names when no action is brought by the personal representative within six months of the death of the deceased, nevertheless provides that the action brought by the beneficiaries shall be subject to

the same regulations and procedure as nearly as may be as if it were brought by and in the name of such executor or administrator. So that if the defendant were in a position to plead *res judicata* as against the personal representative, the defence would seem to be equally available though the action were brought in the names of the beneficiaries.

It may be considered that the sole, or at all events the chief, importance of the question here discussed, turns upon whether or not Lord Campbell's Act has really had the effect of imposing a double liability in respect of the same wrongful act. No decision is to be found that it has had that effect, which, considering the length of time the Act has been in force, of itself affords strong ground for the opposite contention.

In this view of the matter it is submitted that the *dictum* of Gwynne, J., in *Walkerton v. Erdman* is not supportable on either principle or authority. To hold that a double liability is created by Lord Campbell's Act is to assume that the Act has departed from one of the fundamental principles of law, *nemo debet bis vexari*, etc., and it is, moreover, opposed to the authorities. If the action given by Lord Campbell's Act were indeed an entirely new and distinct cause of action from that to which the deceased was entitled, then accord and satisfaction made to the deceased would be no bar to the action brought under Lord Campbell's Act; nor could the contract of the deceased deprive the persons entitled to sue under that Act of their right of suit; nor would the contributory negligence of the deceased be a bar to their right of action; but we have seen that the actual decisions of the Courts, which stand unreversed, are to the contrary effect. All going to show that the cause of action in the deceased and that given by Lord Campbell's Act are practically the same. Then there is the decision of the House of Lords in *Wood v. Gray* that under a similar state of law as exists in Ontario two actions cannot be brought for the same wrongful act, and there is also the decision of the Supreme Court in *Walkerton v. Erdman*, that the two

actions are so far substantially for the same cause, that evidence taken in an action by the deceased is evidence in an action subsequently brought by his representatives under Lord Campbell's Act. Then the reason of the thing seems equally in favour of that view. A. commits a tortious act, whereby B. is injured, and the law gives a right of action in respect thereof to B., and also in certain circumstances to C. The cause of action surely in both cases is the wrongful act resulting in injury to B., notwithstanding that a different measure of damage may be recoverable according to whether the action be brought by B. or C.

Prior to Lord Campbell's Act the damage which C. sustained by A.'s wrongful act was not recoverable, now by that Act it is, but still, as the cases show, not independently of B.'s right of action, but subject to and dependent thereon; so that if B. in his lifetime brings an action and recovers damages for the injury, then there is no right of action in C.; or if B. accepts satisfaction, or contracts not to bring any action for the injury, then neither can C.; or if the injury take place under circumstances which would give B. no right of action against A., then neither has C. any such right. So that the whole course of decision shows that the right of action in the representatives of a deceased person, so far from being distinct from and independent of that to which the deceased was entitled, is really dependent thereon and in substitution therefor; so that although the persons entitled to sue may not in all cases be his legal personal representatives, yet they are special statutory representatives of the deceased, and in that capacity they are entitled to recover damages which they have individually sustained by the wrongful act resulting in his death, provided the deceased himself has not by contract, conduct or a previous recovery barred the right.

Notwithstanding the many judicial *dicta*, therefore, to the contrary, it is submitted that principle, authority and reason favour the view contended for in this paper.

GEO. S. HOLMESTED.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL AND COLONIAL JUDGES.

Public attention in England appears of late to be developing some consideration for the claims of "Greater Britain," and the necessity of giving the Colonies representation on the Judicial Committee of the Privy Council so as to strengthen the judicial authority of the Appellate Court for the Colonies. At a late sitting of the House of Lords, Lord Chancellor Herschell gave notice that a bill would be introduced shortly after Easter, for enabling certain colonial Judges to be appointed members of the Judicial Committee of the Privy Council, a power which the Crown already possesses under the Acts of 1833 and 1887, and could at any moment exercise, but for the hampering difficulty that no qualified Colonial Judge could be induced to accept the position and live in London on the present small pittance of £400 or £800 sterling a year. Lord Herschell possesses special qualifications which will enable him to deal practically, and, we trust, justly to Colonial interests, with this great question, for he has not only the distinguished reputation of being a great Judge, but he has also visited Canada and India, and personally investigated the federal and provincial systems of judicature established in each of these great dependencies.

It is an ancient but trite legislative maxim of the Constitution that "laws to bind all should be assented to by all." The British electorate in the Colonies, however, have no voice or vote with the British electorate in the three kingdoms in shaping or assenting to the laws of the Imperial Parliament which define the constitution and jurisdiction of the Court of Colonial Appeal; nor in advising or controlling the exercise of the Crown's pre-

rogative in the appointment of its Judges; nor any constitutional power of impeachment. Yet, as a Court, it possesses, equally with judicial tribunals responsible to the respective sovereignties, or quasi sovereignties, creating them, that power of legislation over the Colonial or unrepresented subjects of the Crown, by which rules derived from custom or usage; rules by analogy, rules *ex proprio arbitrio*, and rules framed on foreign or international obligations, may be converted into laws after the judicial fashion. (a) And in all this judicial legislation the quasi sovereignties of the Colonies, and the unrepresented Colonial subjects of the Crown, have no part, and exercise no control; and as to them the old aphorism applies that "want of right and want of remedy are *termini convertibiles*, and ride in the one equipage."

The jurisdiction of the "King in Council" is claimed to have been the necessary consequence of the principle of the Constitution, which makes it the first duty of the Sovereign to see that justice is administered to all the subjects of the realm. The *Curia Regis* of early times has been called the "common mother" of all the great Courts of Justice (b). It consisted originally of an assemblage of all the judicial and other councillors of the Crown; but at no time appears to have acted in a collective capacity. For the convenience of the Sovereign, as well as of the subject, the business of the *Curia Regis* appears to have been from time to time classified, and portions of it withdrawn to the jurisdiction of various committees, subsequently erected into independent tribunals. "Many of our institutions, such, for example, as the Court of Chancery, and the ordinary Law Courts, were historically only Committees of the Council, which gradually took a permanent form; and even that body, which would be described simply as the Privy Council, has always acted in Committees selected out of the whole number of its Councillors" (c).

(a) Austin's Lectures on Jurisprudence, vol. 2, p. 655.

(b) Lord Hale's Jurisdiction of the Lords, c. iv. p. 28.

(c) Brodrick and Freemantle's Introduction to Ecclesiastical Judgments.

A late learned writer on the jurisdiction of the Privy Council, contends that the original jurisdiction of the Council was consultive and directive, that any suits or petitions which came before it were not suits in a judicial or contentious sense, and that if any of them were for the direct exercise of judicial power, or jurisdiction, they were simply illegal (*d*). In this he appears to state his proposition too broadly, for in the next paragraph he admits that when it was found that the English Courts had no jurisdiction over the Channel Islands, recourse was had to the fundamental principle of the constitution, which declared it to be the duty of the Sovereign to see that justice was administered in all his dominions, and to prevent a failure of justice.

An earlier writer states that the Council exercised a judicial authority. And he adds: "The jurisdiction of the Council over the proceedings of the King's Justices was exercised in a manner rather resembling the authority which a tribunal possesses over its members than as resulting from the subjection of one Court to another, distinct in function, but superior in authority" (*e*). And Bishop Stubbs says: "We have distinct traces of a judicial system, a Supreme Court of Justice, called the *Curia Regis*, presided over by the King or chief justiciar, and containing other Judges, called justiciars" (*f*).

But whatever may have been the extent of the original jurisdiction of the Privy Council, it would appear that the Parliament of 1640, which abolished the Court of Star Chamber, embodied its legislative jealousy of the Prerogative of the Crown in a statutory declaration that neither the King, nor his Privy Council, have, or ought to have, any jurisdiction, power, or authority to determine or dispose of the lands, tenements, goods or chattels of any of the subjects of the kingdom; but that the same ought to

(*d*) History, Constitution and Character of the Judicial Committee of the Privy Council, by W. F. Finlason (1878), p. 15.

(*e*) Essay upon the Original Authority of the King's Council, by Sir Francis Palgrave (1834), p. 118.

(*f*) Constitutional History, vol. 1, p. 307.

be tried and determined in the ordinary Courts of Justice, and by the ordinary course of the law (*g*).

During the Tudor sovereignty, it had been held in an action brought in the King's Bench for a trespass committed in the Island of Jersey, that "the King's writ runneth not into the isles" (*h*). And in another litigation, the Lords of the Council held that the Isle of Man was an ancient kingdom of itself, and formed no part of the Kingdom of England (*i*). All causes within these islands when determined by their local courts, were subject to an appeal to the King in Council in the last resort (*j*). For it had been held in a case from the latter island that the subject cannot be deprived of his right to appeal to the King in Council by any words in the King's grant to that effect, much less if the grant be silent in that particular (*k*).

When the English people during the seventeenth century began to acquire and settle large Colonial possessions on this western continent of America, the jurisdiction established with respect to the Channel Islands, apparently by analogy, was extended to the colonial territorial dominions of the Crown "beyond the seas." This was the view entertained by the earliest writer on colonial law. He said: "At the time of settling the American Colonies there was no precedent of a judicatory besides those within the realm, except in the cases of Jersey and Guernsey, the remnants of the Duchy of Normandy, not united to the realm of England. According to the custom of Normandy appeals lay to the Duke in Council, and so to the King here, as Duke in Council; and upon this general precedent was an appeal from the judicatories of the Colonies to the King in Council settled" (*l*).

Some of the earlier Colonial charters vested in the proprietors of large Colonial domains the same powers,

(*g*) 16 Car. I. c. 10, s. 5.

(*h*) Coke's Fourth Institute, p. 286.

(*i*) Ibid. p. 284.

(*j*) 1 Blackstone's Commentaries, p. 106.

(*k*) *Christian v. Corren*, 1 P. Wms. 329.

(*l*) Pownall on the Administration of the Colonies (1768), pp. 82, 83.

jurisdiction and royalties, as those possessed by the Lord Palatine of the County of Durham (*m*). In nearly all of them the right of appeal from the Colonial Courts to the King in Council was expressly given.

The jurisdiction respecting appeals from the Courts of the Colonies has been thus defined: "The general rule with regard to appeals from the Colonies appears to be, whenever no limitations have been imposed upon them by Orders in Council, the charters of their Courts, instructions to the Governors, or Acts of Parliament, they are received on petition to the King in Council from all Courts in the King's dominions abroad, on the ground that it is the right of subjects to appeal to the Sovereign to redress all wrongs done to them in any Court of Judicature (*n*).

Notwithstanding that this appellate jurisdiction was especially reserved to the Colonists in the charters, and was in accordance with the principles of constitutional law, the exercise of it was not generally assumed until about 1680; and it was not even then favoured by some of the Colonies. At the time of the American revolution, however, it had become fully recognized as an inherent Colonial right, and was deemed rather a protection than a grievance (*o*).

The Colonial Legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were sovereign, or more properly quasi sovereign, within the limits of their respective territories. The American Colonists considered their respective Colonies, not as parcels of the territorial realm of Great Britain, but as dependencies of the British Crown, owing allegiance to the King as their supreme and sovereign lord (*p*). As the prerogative functions of the Colonial Governments have always been exercised in the name of the Sovereign, it may not be inappropriate to say that the sovereignty represented by

(*m*) Maryland (1632), Maine (1639), North and South Carolina (1662).

(*n*) 2 Knapp's Reports, Appendix iv.

(*o*) 1 Story on the Constitution, s. 176.

(*p*) Ibid. s. 171 and s. 175.

the Colonial Crown might be considered as analogous to that of a Suzerain under the Imperial Crown (*q*).

In 1773 Parliament provided that in any new charter to be granted to the East India Company an appeal should be to the King in Council from the judgment or determination of the Supreme Court of Judicature in India (*r*). Previously to this, however, it is stated that appeals were heard from the judicial decisions of the Governor in Council in Bengal, although no reservation of the jurisdiction of the Crown to receive such appeals, was contained in any of the charters of the East India Company (*s*).

Prior to the Imperial Act of 1833 the title of the Committee of Council before which Colonial appeals were heard was "the Lords of the Appeal Committee of His Majesty's Most Honourable Privy Council." Its present designation is "the Judicial Committee of the Privy Council;" and its title could be made shorter, and more appropriate to the appellate judicial functions vested in it.

Lord Brougham's Act of 1833 for the better administration of justice in His Majesty's Privy Council (*t*) recites that "Whereas from the decisions of various Courts of Judicature in the East Indies and in the plantations, Colonies and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council," and that it was "expedient to make certain provisions for the more effectual hearing and reporting on appeals to His Majesty in Council." It then proceeds to constitute a separate tribunal for such appeals, and designates the judicial personages who are to be members of the tribunal, with a parliamentary recommendation to the Crown to appoint certain other judicial persons from the Indian and Colonial Courts, in the following words:—

"And be it enacted, that two members of His Majesty's Privy Council, who shall have held the office of Judge in

(*q*) See *Nabob of the Carnatic v. East India Company*, 2 Ves. 56; *Penn v. Lord Baltimore*, 1 Ves. Sen. 458.

(*r*) 13 George III. c. 63, s. 18 (Imp.).

(*s*) 2 Knapp's Reports, Appendix vi.

(*t*) 3 and 4 William IV. c. 41 (Imp.).

the East Indies, or any of His Majesty's dominions beyond the seas, and who, being appointed for that purpose by His Majesty, shall attend the sittings of the Judicial Committee of the Privy Council, shall severally be entitled to receive, over and above any annuity granted to them in respect of having held such office as aforesaid, the sum of £400 [\$2,000] for every year during which they shall so attend as aforesaid, as an indemnity for the expense which they may thereby incur." (s. 30.)

This Imperial estimate of the value of the judicial qualifications that an Indian or Colonial Judge would bring to the Supreme Appellate Court of the Empire does not appear to have tempted any Colonial Judge, and not more than one or two of the well-paid and liberally-pensioned Indian Judges to "attend the sittings" and accept the "indemnity for the expense" of serving on the Judicial Committee of the Privy Council. This financial estimate of the Colonial judicial qualifications for which the Imperial Government was willing to pay, or the value at which it estimated the Colonial judicial fitness and experience necessary for the Judicial Committee, would indicate that the Colonial Judges were expected to rank in salary with the subordinate clerks in the office of the Registrar of the Privy Council, who are also paid £400 a year for their services.

In 1871 (u) a more liberal provision was made for the salaries of retired Indian Judges as members of the Judicial Committee, the Crown being authorized to appoint four additional members from the Judges of the English Courts or retired Chief Justices of the Indian Courts, at a salary of £5,000 sterling, or \$25,000 per annum. But Colonial Judges were to remain satisfied with the miserable pittance of £400 sterling allowed for their judicial services by the Act of 1833. Of course no Colonial Judge was ever offered the position, or accepted this Imperial estimate of his judicial value, as a member of the Judicial Committee of the Privy Council.

(u) 34 and 35 Vict. c. 91 (Imp.).

In 1887 the Imperial Parliament in a miserly spirit of illiberality increased the allowance or salary to be paid to a Colonial Judge in the high judicial office of the Privy Council by the following provision: "Any person who shall by virtue of the 30th section of the Act 3 and 4 William the Fourth, chapter 41, attend the sittings of the Judicial Committee of the Privy Council, shall be deemed to be included as a member of the said Committee for all purposes, and shall, if there be only one such person, be entitled to receive the whole amount of the sums by the said section provided, that is to say, £800 [\$4,000] for every year during which he shall so attend; but if there shall, at any time, be two such persons, they shall severally be entitled to the sums provided in the said section" (v), i.e., £400 a year each.

Lord Halsbury, then Lord Chancellor, in moving the adoption of this clause, intimated that the proposed salary of £800 sterling a year, was to "induce those with judicial learning and experience to give the advantage of them to the Judicial Committee of the Privy Council." But so far the temptation has not been sufficiently powerful to induce any Colonial Judge to accept the duty, the responsibility, nor the paltry *honorarium*.

In marked contrast with this low estimate of the value of colonial "judicial learning and experience" in the Judicial Committee, may be cited the salaries paid for judicial services in the inferior and local Courts in England, where Police Magistrates and County Judges are paid from \$7,500 to \$9,000 a year.

Such a marked discrimination against the judiciary of the great self-governing Colonies is unworthy of the Imperial Parliament.

The vastness of the jurisdiction of the Judicial Committee as the Supreme Court of Appeal, may be estimated by a reference to the many codes of law which prevail in our world-wide Empire, and which are and must be largely influenced by the traditions, habits of thought and social

(v) 50 & 51 Vict. c. 70, s. 4 (Imp.)

characteristics of our Colonial communities. In Canada we have the old French law, the English common law, and the constitutional relations of our interlaced but independent legislative and executive sovereignties. In India, the legal code includes Mohammedan and Hindoo customs and laws, with many adaptations of English statutory enactments, and the constitutional relations of supreme and subordinate legislative bodies. In British Guiana and Ceylon there is Roman-Dutch, with some importations of English law. While in the Mauritius the Code Napoleon prevails; in Hong Kong the Chinese; in the Channel Islands Norman-French law; and in the Isle of Man local laws peculiar to itself, all exhibiting such conflicting varieties of code and practice which must tax the highest judicial learning and qualifications for their interpretation.

Of the various Colonial tribunals, those in Canada are vested with a larger power and a higher and more responsible duty than is exercised by the ordinary English, or any other Colonial, Courts. The delicate duties of defining the limits and exclusive functions and powers of our intricate and interlaced legislative and executive authorities, and of upholding the legislative sovereignty of either by declaring null and void the statutory enactments of a Province or the Dominion whenever they are found to encroach on the exclusive legislative powers of the other, are submitted to the arbitrament and decision of our Canadian Judges. And our judicial records show that Canadian Judges have hitherto successfully exercised this supreme and responsible power; and when they have found a Dominion or a Provincial Act beyond the grant of legislative authority, they have unhesitatingly declared it *ultra vires*, and therefore void as a Parliamentary enactment.

A late issue of the London *Times* (*w*) says: "A verbal knowledge of the letter of any given body of law is undoubtedly insufficient for its correct interpretation. Acquaintance with the surroundings of life, and circumstances

(*w*) *Times*, 6th November, 1894.

out of which the laws have sprung, is in many cases essential to a fine balance of judgment. In Colonial appeals the Judges who compose the Judicial Committee of the Privy Council have not only to give their decision upon points of law, with which they are necessarily unfamiliar in practice; they have also to arrive at these difficult decisions without any of the assistance which comes from extra-legal knowledge of the conditions." And it recommends that Canadian, Australian and South African Judges should sit on the Judicial Committee for exactly the same reasons as those for which Indian Judges were originally called to take part in its councils. The suggestion is eminently a practical one, for the presence of such experienced jurists in the Supreme Court of *Imperium Britannicum* would be eminently beneficial and would add a judicial strength and experience to the Court, and so give greater weight and authority to its judicial decisions, and make them more universally acceptable in the self-governing Colonies of the Empire.

THOMAS HODGINS.

EDITORIAL REVIEW.

Remedial Legislation.

The Manitoba school case has produced the first instance of the attempt to exercise jurisdiction in what is now known as remedial legislation. And as it is an entirely novel position in constitutional law, perhaps without a parallel, it is not to be wondered at that there should be a variety of opinion on the interpretation of the clause giving the jurisdiction to pass the remedial order and Act. The *Western Law Times* goes so far as to say that the Dominion Parliament cannot pass a school Act, but can only pass a coercive Act to compel the Province to pass the necessary legislation, and as this involves absurdities both in theory and practice, the consummation of the attempt to coerce Manitoba is necessarily far off, if not itself an absurdity—an impossibility. With the political side, the prudence of the attempt, the policy of resisting it, we have nothing to do; but upon the constitutional point involved we have some remarks to offer.

The clauses of the Act are certainly not as plain as one would like to see them in a constitutional Act or charter. They bear some evidence of a straining after an effect which was not to be too plainly disclosed, yet which was to be included in the general words and scope of the clauses. The first sub-section of section 22 of the Manitoba Act applied only to such rights and privileges as existed at the time of the union; and as the Privy Council has decided that none existed, the clause is non-effective and may be ignored. The second sub-section gives an appeal to the Governor-General in Council from an Act of the Legislature or any Provincial authority. The third sub-section gives the power to the Dominion Parliament to execute the necessary process. What that process is, our contemporary thinks doubtful. This section postulates two courses of

proceeding, the evident distinction between which has not received any notice in the public discussions of the matter. It is necessary to quote the Act to make this clear:—

“ In case any such Provincial *law*, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, etc.” This part of the clause implies: 1st, that, *sua sponte* and in the absence of an appeal, the Governor-General may make some discretionary order or recommendation; 2ndly, that the Legislature of the Province shall carry out the recommendation by a *law*, i.e., an Act of the Legislature.

Note now the contrast between that part of the clause and what follows, continuing from the last quotation:—“ or in case any decision of the Governor-General in Council *on any appeal* under this section is not duly executed by the proper Provincial authority in that behalf, etc.” This part of the clause postulates: 1st, an appeal to the Governor-General in Council; 2ndly, that a “decision” is to be arrived at and made known; 3rdly, that it shall be *executed* by the proper authority. The first part of the clause expressly refers to the making of a law, i.e., the passing of an Act, to carry out the recommendation; the second part refers to a decision complete and ready for *execution* by any proper authority.

The very plain contrast between these two clauses certainly permits of the interpretation, if it does not require it, that where a decision is made on an appeal it must be of such a complete character that no discretion will be exercised in putting it into operation. In fact, nothing remains to be done but put it into operation or execution. Legislation implies debate, the exercise of discretion. Execution is a purely ministerial function, and implies exact performance of that which is ordered.

How far, then, the Manitoba Legislature might be justified in saying that the remedial order should be more explicit, would be an interesting question. They might point to the first part of the clause and say, “ If you had

acted under that, and had requested or recommended us to pass a *law*, this would have involved the right to discuss and debate it, and perhaps we might have arrived at a measure which would carry out the object you have in view—not in the way you recommended, it is true, but still in a way satisfactory both to you and to our own constituents. But having given a decision on an appeal, the Manitoba Act requires that we, if we are a Provincial authority within the meaning of the Act, shall have no legislative discretion, no debate on it, and, therefore, no legislative responsibility; that we must simply *execute* or put into operation your decision. If the only way of doing so is to pass an Act, you must draft it; for if by our drafting we should not with the utmost exactness carry out your order, then we would lose jurisdiction—an end we do not desire. Therefore, state exactly the decision leaving us nothing to do but carry it into effect.”

To take the exact words of the Order. “It seems requisite (1) that the system of education embodied in the two Acts of 1890 aforesaid shall be supplemented (2) by a Provincial Act or Acts, which will restore to the Roman Catholic minority the said rights and privileges of which such minority has been so deprived as aforesaid, and which will modify the said Acts of 1890 so far, and so far only, as may be necessary to give effect to the provisions restoring the rights and privileges enjoyed by the Roman Catholic minority previous to and until the first day of May, 1890, as follows:—(a) The right to build, maintain, equip, manage, conduct and support Roman Catholic schools in the manner provided for by the said Statutes which were repealed by the two Acts of 1890; (b) the right to share proportionately in any grant made out of the public funds for the purposes of education; (c) the right of exemption of such Roman Catholic schools from all payment or contribution to the support of any other school.” Clause (a) of this Order does not either expressly or by implication require the Legislature to provide any system of taxation, municipal or otherwise, for the support of the schools. It is idle to say it is implied, because the restoration of the

right under the second clause would also have been implied, as part of the former system referred to, and it is expressly mentioned as a substantial right. Clause (a) therefore may be interpreted to give only power to maintain voluntary schools—a power never interfered with. The language, instead of being particular and explicit, is curiously inexact. Again, is all right of State control forbidden? Under the former system there was a joint board, consisting of two sections. One section cannot be restored without the other. Must the system of inspection remain the same forever, or can a better system, if devised, be put into operation? Then as to the proportionate sharing in public grants—in what proportion? In proportion to the population? or to the school attendance, actual or nominal. The slightest error in carrying out this Order does not comply with the terms of the Act, which requires execution or exact obedience. The slightest departure would throw jurisdiction into the Parliament of Canada.

The looseness of the language is particularly apparent in clause (c), which exempts the “Roman Catholic schools” from payment or contribution to other schools. Would this be complied with by exempting the school property and funds from contribution, leaving the land and goods of the supporters subject to levy? Again, suppose a Roman Catholic ratepayer desires to support a public school. Can his property be taxed for its support? or, is the Legislature bound to exempt him from taxation? In other words, can the Separate School authorities require that, if he is to be taxed, his taxes shall go to the Separate school?

If either the Provincial Legislature or the Provincial authority does not carry out the order or recommendation, then, to continue the quotation from the clause, “then and in every such case, and so far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.” For the first time the Parliament of Canada gets jurisdiction; and this part

of the clause implies: 1st, that the Provincial authority or Legislature neglects or refuses to pass a law or execute the demand; 2nd, that the Parliament may make laws for two defined purposes, viz., the due execution of the provisions of this section, and the due execution of the Governor-General's decision. In the present case we are concerned with the latter subject only. It is with this clause that the *Western Law Times* finds difficulty. We do not share the opinion there expressed, however. The Parliament can only enforce or execute the order by making a law; and that law cannot be a law commanding the Provincial Legislature to pass an Act; for it would be no more effectual than the Governor-General's order. The only interpretation of the Act is to give jurisdiction to pass the Act which the Provincial Legislature ought to have passed. Here again, however, difficulties arise. For if the Act does not with the greatest exactness comply with the order it is void. The jurisdiction is strictly limited to legislating within the lines laid down by the order, but there is great scope for debate on the terms of the order. Some discretion, great latitude are possible. And who shall say that the Act, if passed, will not be challenged and the matter again go through the Courts?

The Alleged Judicial Advertisement.

We have received a communication from the learned Judge whose name appeared in the advertisement which we published without names in the last regular number of this journal. The learned Judge says that certain persons "knew or ought to have known that such an advertisement could not emanate from" him. We cheerfully accept that statement, as it was no doubt intended, namely, as an emphatic denial that he knew of the advertisement at all before we published it. It appeared in two newspapers, both of which were in our possession at the time, and to overlook it would have been distinctly detrimental to the interests of the profession.

We can only say, and we are glad to be able to say, that

we regret exceedingly having cast any aspersion on the newly appointed occupant of the Bench.

There is only one other source from which it could have emanated. And we repeat that is a case for the Committee of Discipline. If it was deliberately published by the gentleman who is called "successor" to the Judge it is an insult to the Bench and a gross breach of professional etiquette.

The Clara Ford Case.

The acquittal of the prisoner after hearing the evidence as to her alleged confession made to a detective shows the futility of obtaining a confession in that manner, even if properly obtained and put in evidence. Possibly the jury may have been moved to compassion by hearing in evidence that the prisoner was for seven hours closeted with detectives and police constables before she made the alleged admission of guilt. In any case, if the jury had convicted it would have been a direct warrant to detectives and constables to harry prisoners (warning them meanwhile of course) until something should be extracted in the end.

A confession of guilt is, in fact, a plea of guilty—nothing more nor less. And we think this case shows very clearly the advisability of taking a prisoner before a magistrate when he is prepared to confess, and not leaving such an important matter in the hands of a police officer.

The attempt of the detective to establish that the prisoner was not under arrest at the time because he postponed formalities till after the alleged confession cannot be too strongly condemned.

The Chancellor's remark on admitting the evidence of the confession, that he did not see why "criminals" should be surrounded with sanctity, was certainly peculiar. Lawyers, of course, understood that he was speaking in a general way and was not referring to the prisoner as a "criminal." But juries are not trained to fine distinctions, and such a remark might well lead a wavering jury to think that the Judge was convinced that he was right in calling the prisoner a criminal.

THE CANADIAN LAW TIMES

JUNE, 1895.

FENCES.

COMMON LAW.—By the common law of England a land owner is not required to fence his land at all, but he is required to keep his cattle from straying; and if, by reason of his not fencing the land where his cattle are, they escape on to another's land, he is liable for the damage that ensues. So, on the other hand, a land owner may leave his land totally unfenced, and if his neighbour's cattle trespass upon such land he has a right of action for such trespass. The rule is concisely stated in Gale on Easements (a). "The only general obligation with respect to fences imposed by the common law is that every proprietor of land should prevent, by fences or other means, his cattle from trespassing on the land of his neighbours."

Remedies.—The remedies of the party injured are two: In the first place the trespassing animals may be distrained; but this right can only be exercised in case actual damage is done by the animals, and they must be taken in the very act. If they once get off the premises they cannot be seized for the damage then done if they should return. The authorities on this point are carefully considered in the judgment of Hagarty, C.J.O., in the case of Graham v. Spettigue (b). Besides this right of distress, the injured party has a right of action of trespass "*quære clausum fregit*" (c). The common law right of dis-

(a) 6th Ed. p. 455.

(b) 12 A. R. 261.

(c) See Blacklock v. Milliken, 3 C. P. 34.

tress has been largely extended in Ontario by our statutes, provision being made for selling the animals to meet the damage and expenses incurred. Care must be taken, however, in exercising this right to keep strictly within the provisions of the law, as is shown in the case of *Brown v. Williams* (*d*), where the pound-keeper distrained and sold animals trespassing on his property. It was held that as the statutes in force at the time only gave him power to sell in the case of animals brought to him by some other person, for doing damage or for violating the township by-laws, he had no power to sell where he himself had made the seizure for trespass on his own lands.

Application to Colonies.—The common law as to fences has frequently been held to be inapplicable to the condition of a new colony and consequently not in force there. There is abundance of authority on the point in the United States courts, some States, particularly the eastern and oldest settled ones, holding to the common law rule, and others denying its application to them. The case of *Buford v. Houtz* (*e*), decided in the Supreme Court of the United States on appeal from the Supreme Court of Utah, discusses the question. Quoting from the judgment in that case, "It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds, or else would be liable for their trespasses upon the unenclosed grounds of his neighbour. Such a principle was ill adapted to the nature and condition of the country at that time. Indeed it is only within a few years past as the country has been settled and become highly cultivated, all the land nearly being so used by its owners or by their tenants, that the question of compelling owners of cattle to keep them confined has been the subject of agitation." The case of *Kerwhacker v. The Cleveland C. & C. Ry. Co.* (*f*) is cited in *Buford v. Houtz* to the same effect and largely quoted. It is

(*d*) 6 O. S. 656.

(*e*) 133 U. S. R. 320.

(*f*) 3 Ohio St. 172.

there said : " Admitting the rule of the common law of England in relation to cattle and other livestock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this State and in accordance with their habits, understandings and necessities. . . . The common understanding upon which the people of this State have acted since its first settlement has been that the owner of the land was obliged to enclose it with a view to its cultivation ; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbour running at large ; and that to leave uncultivated lands unenclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances and condition of the people of this State, but inconsistent with the habits, the interests, necessities and understanding of the people." There are other cases cited from various States to the same effect.

Application to Ontario.—The common law as to cattle running at large has received little attention in Ontario by reason of the fact that from the earliest days of legislation in this country special statutory enactments have governed the point ; and, as is pointed out by Hagarty, C.J., in the case of *Crowe v. Steeper* (*g*) our Pound Act, R. S. O. cap. 215, sec. 2., now declares the law, where not affected by local by-laws, to be in accordance with the common law. Investigation, however, of the older cases and the early statutes impels to the belief that the common law of England in this matter was not considered as adapted to the circumstances of this colony in its early days, and therefore, on the principle laid down in *Doe dem. Anderson v. Todd* (*h*), not in force here.

There is to be found in Robinson and Joseph's digest, at column 1517, under the heading of " Fences," a short note as follows : " A land owner in this country must fence

(*g*) 46 U. C. R. 87, at p. 92.

(*h*) 2 U. C. R. 82.

against cattle," and the authority given is a case of *Spafford v. Hubble*, M. T. 2 Vict. Earlier than that there is the case of *Ives v. Hitchcock* (i), and both of these cases are discussed in the case of *Buist v. McCombe* (j). In the judgment in the last named case it is said: "The case of *Ives v. Hitchcock* shows what the decision in *Spafford v. Hubble* must have been. That if the township law did not forbid cattle running at large or allowed them to run at large they could not be taken for damage feasant unless the owner of the land trespassed upon had a sufficient lawful fence. But if the township laws prohibited cattle from running at large the owner of them was bound to prevent them at his own risk from doing damage to his neighbour, whether the neighbour trespassed upon had or had not fenced his land." It will be thus seen that the legislature of the Province at an early date delegated to the townships the duty of defining the law within their respective limits; and, in case of there being no local law on the point, declared that the onus was on the land owner of fencing out cattle, and not on the cattle owner to fence in his animals. In other words, the general law permitted cattle to run at large until restrained by by-law. The cases we have considered above really turned upon what in each case the township had enacted. But the customary law prior to these statutes giving local authority in the matter appears more clearly by reference to the statutes themselves.

The Ordinance of Quebec, 30 Geo. III. cap. 4, recites: "Whereas it has been represented by many respectable inhabitants of the Districts of Quebec and Montreal that the usage or custom of allowing cattle to go at large in the fall and spring of the year, under the name of *l'abandon des animaux*, is hurtful to improvement and agriculture," and then proceeds to enact that the custom shall be abolished, and provides for impounding animals trespassing etc. Next comes the Statute of Upper Canada, 33 Geo. III. cap. 2. This provides for the appointment of local

(i) Dra. 259.

(j) 8 A. R. 598.

public officers, among others, of overseers of highways, who shall also serve the office of fence-viewers, and are authorized to determine the height and sufficiency of fences in their parish or township conformably to any resolutions that may be agreed upon by the inhabitants. It also provides for the appointment of a pound-keeper, who is authorized to impound cattle and other animals that shall trespass on the lands of any person having inclosed the same by such high and sufficient fence as shall have been agreed on in manner aforesaid; and also to impound any stoned horse more than one year old that shall be running at large upon the highways or commons. This statute did not make it incumbent upon the owner of horses and cattle to restrain them from running at large, except in the case of stoned horses; but it did impose on the land owner the duty of enclosing his land by a proper fence if he wished to prevent the cattle of his neighbours trespassing on him. This was, as we have seen, in direct opposition to the common law of England. The next statute in order was Statute of Upper Canada, 34 Geo. III. cap. 8., which begins by reciting: "Whereas the custom of allowing horned cattle, horses, sheep and swine to run at large has been found occasionally inconvenient and detrimental," and enacts that "from and after the passing of this Act it shall not be lawful for any person or persons to permit any horned cattle, horses, sheep or swine to run at large otherwise than under the regulations and restrictions hereinafter provided." Section 2 provides that "henceforth it shall and may be lawful for the inhabitant householders, or the greater part of them, in every district within this Province, in their annual town meetings lawfully assembled, to ascertain and determine in what manner and at what periods horned cattle, horses, sheep and swine, or any of them, shall be allowed to run at large within their respective divisions, or to resolve that the same, or any part thereof, shall be restrained from so doing." Section 3 provides for impounding animals running at large contrary to the resolutions of the town

meeting. This is the first Act which declares that it shall be unlawful for animals to run at large.

It is unnecessary to cite more of these early statutes. Those mentioned show that the common law of England in this connection was not considered as in force here by the legislature of the day.

It would seem, however, that as the country became more settled, and the circumstances of life so changed as to become adapted to it, the common law would gradually apply to the settled localities. Upon such an assumption the references to the common law in some of the cases is explainable. In the case of *Crowe v. Steeper*, cited above the learned Chief Justice says: "By the common law, I think if these cattle stray from the highroad into the land of another and do damage there, the owner is responsible therefor irrespective of any question of fencing." In the last mentioned case reference is made to the case of *Jack v. Ontario and Simcoe R. W. Co.* (*k*). "The jury were told by the Chief Justice, Sir J. B. Robinson, that as the by-law did not affirmatively authorize cattle to run at large, but only negatively provided that certain animals and under certain circumstances should not run at large, the common law principle, that all persons were bound to keep their cattle from trespassing upon others, was in force, and not abrogated." Again, in the recent case of *Duncan v. C. P. R.* (*l*), reference is made to the common law as though it were now recognized in this country. Speaking of the two cases last mentioned, the learned Judge says: "They are both cases going to show that any by-law of a municipality intending to alter the common law so as to permit horses, cattle and other animals to run at large, must be clear and unequivocal in its language as to such permission." And again, referring to a special enactment (sec. 82 of the Unorganized Territory Act, R. S. O. cap. 91), which was an effort of the legislature to provide suitable laws in regard to cattle running at large for those sparsely settled

(*k*) 14 U. C. R. 328.

(*l*) 21 O. R. 355.

districts, he says: "The section seems to have been framed in ignorance of the common law rule as to the running at large of cattle."

General Statutes.—The policy of the early statutes to which reference has been made of allowing the township councils to legislate for themselves on this subject is still maintained, and the fullest possible power is given them in respect thereto; while as to the general law the Pound Act, R. S. O. cap. 215, declares that the owner of animals not permitted to run at large by the by-laws of the municipality shall be liable for any damage done by such animals, although the fence enclosing the premises be not of the height required by such by-laws. "The premises" here, of course, means the premises trespassed upon.

Section 490 of the Municipal Act, sub-sec. 2, gives the council of every township, city, town and incorporated village authority to pass by-laws for restraining and regulating the running at large or trespassing of any animals; and it has been held that this power might be exercised to the extent of prohibiting all animals from running at large at all seasons. In the case of *Milloy v. Township of Onondaga* (*m*), it was argued that a by-law prohibiting so absolutely as that was unreasonable and oppressive; but it was held to be not necessarily so, and, inasmuch as the council, in passing such a by-law, was acting within its powers, the Court would not interfere.

Dangerous Fences.—Sec. 489, sub-sec. 17, of the Municipal Act provides for the council settling the height and description of lawful fences. As to the description of fences which a man may erect where the by-laws are silent on the point, and apart from the question of those which he must erect in a stated manner as provided in The Line Fences Act, discussed later, it would seem that any fence is lawful which, considering the locality and the general convenience, cannot be regarded as a nuisance. In the case of *Hillyard v. G. T. R.* (*n*), the question of the

(*m*) 6 O. R. 573.

(*n*) 8 O. R. 583.

kind of fence which may be used is much discussed, the case arising out of the death of a colt which injured itself against the barb wire fence of the defendants. Wilson, C.J., there says : " That such a protection may be dangerous and a nuisance in some places cannot, I think, be doubted. If the doorways of shops and the boundaries of private residences, churches and other buildings, or the sidewalks of thoroughfares upon King Street in the City of Toronto, for instance, and perhaps upon all sidewalks, were fenced in that manner, I should say the fence would be a nuisance, . . . and it would make no difference that such a fence in such a place stood a few inches off the street limits of the road upon the property of the owner. But whether the fence which would be dangerous and a nuisance along such walks and great and crowded thoroughfares would be a nuisance alongside of country highways will, in my opinion, require a different consideration." The learned Judge, after a careful and exhaustive treatment of the matter, concludes that for farm fencing the general public convenience requires the use of the barbed wire, and such fences cannot, therefore, be treated as a nuisance where the township by-laws have made no reference to them. He further supports his judgment by referring to Statute 45 Vict. cap. 23 (O.), now contained in R. S. O. cap. 184, sec. 489, sub-sec. 19, " For providing proper and sufficient protection against injury to persons or animals by fences constructed wholly or in part of barbed wire or any other material." He says as to this : " It would be difficult in the face of that enactment to treat them as a nuisance." It should be noticed, in connection with the learned Judge's remarks quoted above that this sub-section has been amended (o) by adding " and in towns and cities for wholly prohibiting the construction or erection of fences made wholly or in part of barbed wire any other barbed material along streets and public places."

It would seem then that the propriety of using any certain description of fence must be tested by all the sur-

(o) 53 Vict. cap. 50, sec. 18.

rounding circumstances ; and, while applying the maxim *sic utere tuo, due regard* should be had at the same time to the reasonable requirements of general convenience. A recent case in Indiana exhibits an instance of how circumstances may affect the question. An unenclosed lot belonging to the defendant was crossed by a road which had long been used as a short cut. The owner of the land suddenly decided to fence his property, and enclosed it with a barbed wire fence without any notification that he was closing the road. The plaintiff's horse, driven at night over the short cut, ran into the fence and was seriously injured, and the defendant was held liable.

Special Obligation.—Whenever the general liability with regard to fencing is varied, as for instance, by agreement between adjoining owners or by Statute, which imposes the duty on one of keeping up fences for the benefit of another, the liability for damage caused by animals escaping through defect of such fences assumes a different aspect. In such a case the party through whose neglect of duty to fence the damage happens is responsible, whether it be a case of his cattle escaping and doing damage or his neighbours' animals escaping and coming to grief, as in the case of *Lawrence v. Jenkins* (p). In this case the defendant was liable by prescription to maintain and repair a fence separating his close from the plaintiff's. This fence was broken down by a third party felling a tree upon it. The plaintiff's cows escaped through the broken fence one night, ate the foliage of a yew tree which had been felled on the defendant's land, and, as a result, the animals died. The defendant was held responsible for the loss, and that, although he had no knowledge of the injury done to the fence.

Line Fences.—The Line Fences Act, R. S. O. cap. 219, is an Act to compel the owners of adjoining occupied lands to maintain a fair proportion of the fences which separate their properties. This is for their mutual benefit, and each party is responsible for the damage which results

(p) 28 L. T. R. N. S. 406.

from neglect of his duty. The first Act we have of this kind is 4 Wm. IV. cap. 12, the recital to which states the object of such litigation; it is as follow: "Whereas much difficulty and inconvenience are experienced and many disputes arise from the want of some provincial enactment by which each party interested in the making or repairing any line fence may be compelled to make or repair, or pay for making or repairing a fair and just proportion of such fence." Section 3 of the present Act declares the duty on such adjoining owners to make and maintain a just proportion of the boundary fence; then provision is made for determining the locality, quantity, description and the lowest price of the fence by an award of fence-viewers, who are officers appointed by the municipalities for that purpose. Provision is made for appeal from the award to the County Court Judge, whose decision is final.

If, after the proceedings prescribed by the Act, either party neglects to perform his part as found by the award, the other may do the work and recover in the Division Court against the party who should have done it. The duty of the fence-viewers to ascertain the part of the fence for which each party is responsible only arises where the parties can not come to an understanding about it between themselves. In *Lamb v. Mullholand* (q), the plaintiff's horses escaped through defective fences separating the plaintiff's and defendant's closes, and the defendant seized them and handed them over to the pound-keeper. Each party declared that the defective part of the fence where the horses had escaped was the portion which the other was liable to maintain in accordance with the understanding which had been acted upon by former occupants for years. The Line Fence Act of 1834 was then in force, which required each party to keep up and repair a just proportion of the line fences, and, in case of dispute as to their respective portions, the fence-viewers should decide. The jury found the duty on the defendant, and the Court held that it was not a question for the decision of fence-

(q) 5 O. S. 109.

viewers, as the parties themselves had come to an understanding as found by the jury, although that understanding had not been observed.

As the provisions of the Line Fence Act do not apply to a case where the parties have come to an agreement between themselves in the matter, neither do they apply where the township by-laws have made regulations with regard thereto. Sub-section 18 of section 489 of the Municipal Act empowers township, city, town and village councils to regulate the height and description of lawful division fences, and to determine how the cost thereof shall be apportioned, and to direct that such cost may be recovered in the same manner as penalties under the Act. It is specially provided that until such by-laws are made the Line Fences Act shall continue applicable to the municipality.

Fence Viewers.—The duties of fence-viewers are not confined to apportioning line fences between adjoining owners. Where under the provisions of the Pound Act cattle have been distrained damage feasant and impounded, and the owner of the animals disputes the amount of damages claimed, fence-viewers are called in to determine whether the party trespassed upon had a lawful fence, and, if so, they are to appraise the damage. The Act seems to be inharmonious here. Section 2 makes the owner of the trespassing animal liable for damage though the property trespassed upon were not enclosed by a lawful fence, while sections 20 and 21 provide means for recovering such damage only where the fence was a lawful one. The fence-viewers' jurisdiction is limited in assessing damages to the extent of twenty dollars. Greater damage than this must be recovered by action.

Fencing Roadways.—There is no liability on the part of municipalities to fence their roads unless it be by statute (*r*). But the obligation cast on them by our Municipal Act to keep their highways in repair involves the obligation to do whatever is necessary to make the

(*r*) *Wilson v. The Mayor of Halifax*, L. R. 3 Ex. 114.

road fit for ordinary travel, even though it necessitate the construction of fences in dangerous places (*s*). The council may, however, under sub-section 17 of section 489 of the Municipal Act, pass by-laws requiring owners of lands adjoining highways to fence them in a stated manner along the highways, and provide for making compensation for any increased expense such owners are put to in consequence. By sub-section 20 they may require the owners or occupiers of lands bordering upon any public highway to take down, alter or remove any fence, subject to the provisions of the Act respecting Snow Fences (*t*). This latter Act authorizes the council to require the removal of any fence which borders a highway and causes snow drifts which obstruct travel; but at the same time requires that compensation shall be made to the party required to remove his fence. By section 511, sub-section 3, of the Municipal Act these powers are conferred on county municipalities in respect of county roads.

Railway Fences.—The obligation on railway companies to fence their lines is regulated by statute, and the liability for damage resulting from neglect of their duty in that respect is to be determined by the extent of such obligation. The rule to be gathered from the cases is that, unless the statute clearly imposes a greater obligation on the company, it is responsible only to the adjoining owner between whose land and the railway line the defect in its fence exists by reason of which loss happens. So, if there is a defect in the company's fence at a certain point, and cattle trespassing on the adjoining land at that point get through the defective fence on to the track and are killed, the company is not liable to the owner of the cattle.

On the other hand, if the statute clearly imposes an unqualified general duty on the company to protect its line at certain places, and it neglects to do so, the owners

(*s*) *Thoms v. Whitby*, 37 U. C. R. 100; *Sherwood v. Hamilton*, 37 U. C. R. 410.

(*t*) R. S. O. cap. 193.

of animals which get upon the track through such neglect and are injured may recover against the company, although the animals were not lawfully on the land from which they escaped on to the railway line. There are innumerable cases on the subject, every new railway Act requiring to be construed to ascertain whether the obligation to fence in particular cases was a general one or only as against the adjoining owner. The leading case, and the one which establishes the latter part of the rule stated above, is *Fawcett v. The York and North Midland Railway Company* (*u*). The statute in that case required the railway company to keep gates closed across each end of a highway where it was crossed by the railway. The plaintiff's horses, being unlawfully at large on the road, wandered on to the defendants' line of railway, the company's gate having been left open, and were killed by a train. The company were held liable. Wightman, J., in delivering his judgment, says: "Beyond all doubt, it was the duty of the company to keep that gate shut. The question is whether that obligation is imposed on them as against wrongdoers. Now, it seems to me that the company were bound to keep that gate shut at all events, and, if an accident occur by reason of the gate being left open, no question can be raised whether the person or cattle injured were lawfully on the road or not. It is said that by the express terms of this issue the defendants are entitled to succeed because the horses were not on the road for a legitimate purpose. But I think that as against the company they must be considered as being there lawfully, whatever might have been the case as against the owner of the soil." This case was followed by *Ricketts v. The East and West India Docks Company* (*v*), where the plaintiff's sheep had strayed on to land adjoining the railway where they had no right, and thence, through defect of the railway company's fence, on to the track and were killed. The Act in question in that case provided that "The company shall make and at

(*u*) 16 Q. B. 610.

(*v*) 12 C. B. 160.

all times hereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway. . . . Sufficient posts, rails, hedges, ditches, mounds or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers from straying thereout by reason of the railway, etc." It was held that this statute did not cast upon the company any general duty, such as in the case of *Fawcett v. The York and North Midland Railway Company*, and that the defendants were therefore not liable. Jervis, C.J., in his judgment, says: "The 68th section has cast upon them (the company) the liability to make and maintain fences as against the owners or occupiers of adjoining closes and no other. It is said that this decision may conflict with *Fawcett v. The York and North Midland Railway Company*, but this is not so. If that case had been on the common law liability *Fawcett* could not have recovered at all, but the decision was upon the Act of Parliament, which imposed the duty on the railway company of closing the gates." Williams, J., in the same case, after referring to the common law liability, says: "The only question is, whether the obligation cast upon the railway company by the Act of Parliament is the same, or whether it throws on them a general duty, as in *Fawcett v. The York and North Midland Railway Company*. I think that the Act of Parliament creates no such general duty."

The rule is stated clearly in the case of *St. John and Maine Ry. Co. v. Montgomery (w)*, in the judgment of King, J.: "*Fawcett v. The York and North Midland Ry. Co.* shows that if the obligation to fence is a public one, the fact that the plaintiff is (as between himself and third parties) wrongfully on the land outside the railway track is wholly immaterial. In such case he is not a wrongdoer towards the defendant, whatever he may be towards the third person." These have been the principles of con-

(w) 21 N. B. S. C. R. at p. 448.

struction in all cases, although at times in this country they seem to have been strained in favour of the railway companies. For instance, the Statute of Canada, 14 & 15 Vict. cap. 51, sec. 13, reads: "Fences shall be erected and maintained on each side of the railway of the height and strength of an ordinary division fence, with openings or gates or bars therein at farm crossings of the road for the use of proprietors of lands adjoining the railway." The case of *McLennan v. G. T. R.* (x) decided that the words "for the use of the proprietors of lands adjoining the railway" applied to the obligation to fence, and therefore the obligation was not general, but limited to such proprietors. Afterwards came the case of *Douglass v. G. T. R.* (y) on the same statute. Patterson, J.A., in his judgment there, after reciting the Act, says: "It has been settled by a long and uniform chain of decisions that the cattle for damage to which the railway company is liable under this Act are only those of the adjoining proprietor whose land has not been sufficiently fenced. It is now too late to raise the question whether the statute would not have borne a wider construction." Moss, J., in giving judgment in the same case, says: "It is settled law, which, whatever may be our independent view of the true construction of the statute, we ought not now to disturb, that the statutory obligation to fence could only be invoked where the cattle of an adjoining proprietor had been injured." Our present Railway Act, Statutes of Canada, 51 Vict. cap. 29, provides as to fences in section 194 as follows: "When a municipal corporation for any township has been organized, and the whole or any portion of such township has been surveyed and sub-divided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township of the height and strength of an ordinary division fence, etc." If the Act had stood at this without more, it is probable that it would have been held that a general obligation

(x) 8 C. P. 411.

(y) 5 A. R. 585.

was cast upon the railway company for the benefit of the inhabitants of the township, and in consequence the company would have been liable for injury to animals which got on the track through defect of their fence, whether the animals were rightfully or wrongfully on the land from which they got upon the track; but whether this would have been the true interpretation of the Act as originally passed or not, it is impossible to so interpret it now, in view of an amendment made by 53 Vict. cap. 28, sec. 2, which reads as follows: "If the company omits to erect and complete, as aforesaid, any fence or cattle guard, or if, after it is completed, the company neglects to maintain the same as aforesaid, and if, in consequence of such omission or neglect, any animal gets upon the railway from an adjoining place where, under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines; and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there." It follows from this that unless animals are allowed to run at large, if they are trespassing on land adjoining the railway and escape thence on to the track through defect in the company's fence, the company is not liable for the loss that results. This was held in the case of *Duncan v. C. P. R.* (2), mentioned above, though the question in that case of whether the animals were lawfully at large, in view of the provisions of the Unorganized Territory Act, would seem to have deserved fuller treatment.

The question of whether under particular circumstances animals are wrongfully on land from which they escaped on to the track may involve very nice considerations, and there are a number of cases dealing with the question on a variety of facts, which, however, it would be beyond the scope of this article to consider in detail. In some cases,

(2) 21 O. R. 355.

as we have seen, the cattle, though improperly on the land as against the owner, may not be improperly there as against the railway company; and again they may be there not improperly as against the owner, and yet not so rightfully there as against the company as to be entitled to the protection of its fences.

Dangers on Private Land Near Highway.—There is one duty with regard to fencing which should be noticed as an exception to the general common law rule, and that is where there is a dangerous pit or other peril on the land so close to the highway as to be dangerous to persons using the road. In such a case the owner must protect the travelling public by fences or otherwise. The law on this point is to be found in *Hounsel v. Smyth* (a), followed by *Binks v. South Yorkshire Railway and River Dun Co.* (b). Williams, J., in delivering judgment in *Hounsel v. Smyth*, says: "The general doctrine as to the non-liability of owners of land to fence excavations therein was qualified to this extent by those (citing certain cases), amongst other cases, that the excavation must not be made so near to a public road as to amount to a public nuisance, and that if it do amount to a public nuisance, and a particular injury result therefrom to an individual an action will lie." This case is quoted with approval in *Binks v. South Yorkshire Railway and River Dun Co.* Wightman, J., in the latter case adopts the language of Keating, J., in the former: "To throw upon the owners the obligation of fencing this excavation in their waste land adjoining the roads, it ought to be shown that the excavation was so near to the roads as to be dangerous to persons lawfully using them."

R. M. MACDONALD.

(b) 7 C. B. N. S. 731.

(a) 32 L. J. Q. B. 26.

EDITORIAL REVIEW.

Colonial Judges in the Privy Council.

The telegraphic despatches inform us of Lord Rosebery's bill to appoint Colonial Judges to the Judicial Committee of the Privy Council having been introduced. The provisions of it are not likely to carry joy to the hearts of those who are in favour of the proposal. It is proposed by the bill to make any retired Judge of the Supreme Court of Canada eligible to sit on the Committee; his salary is to be paid by Canada, and he is to be called in only when his services are required. The spirit of the measure is significant. It bears the appearance of having been drawn to meet the case of an urgent proposal from a Colonial source to appoint Colonial Judges. And, if it is in fact the response to such a proposal, it is ample for the purpose. It means, in the first place, that from the British point of view Colonial Judges are not wanted. There is no pressing need for them felt by the Judicial Committee or any one else in Great Britain, and very naturally so. In the second place, it plainly means that if the British Dependencies or any of them, want a Judge to sit on the Committee there will be no objection, provided that he is kept at home on a salary, and only goes to England when he is wanted. That of course will be never, for the want of them is not felt. As far as Canada is concerned, there is a duty incumbent on her to pay her own overworked judges according to the value of their services, before providing for a Judge to sit on the Judicial Committee. And as this duty has been hitherto persistently neglected, and is likely to be neglected for a long time to come, it is not likely that Parliament will provide an additional salary for a Judge who will perhaps never be called upon to sit. When it is con-

sidered, moreover, that our Judges retire only when disabled by ill health or on account of old age, the prospect of having a man who feels that he is past his work to sit in review upon the judgments of men who retain their vigour and faculties is not one that on principle is satisfactory. It is true that the prospect of such a position might tempt some Judges, who are quite capable, to retire while still able to accomplish satisfactory work; but such men are needed in the Courts and are too valuable to retire.

The scheme indicates that the Colonial Judges who may be appointed are not to perform general services, but are to be called upon only when Canadian cases are to be heard. Here another difficulty arises. Are we to have two, one versed in English, and the other in French, law? The English lawyers might well say that there are enough civil lawyers on the Committee already to deal satisfactorily with cases from Quebec; while the civil lawyers might as well say, there are enough English lawyers on the Committee to deal with all the Colonies which have English common law in force. The only conclusion that one could come to under the circumstances is that both are right; there are enough of both to despatch all the business from all the Provinces.

A good deal is said about the advisability of having a Judge who has lived in the "atmosphere" of Colonial law, etc., etc. If that is so, a very good way to get the full benefit of the atmosphere is to leave the Supreme Court in each dependency to deal finally with appeals. If it is thought that the presence of a Canadian Judge or an Australian Judge is going to influence the Committee to such an extent that they will adopt his views, he will do just as good work in Canada or in Australia if left there. If not, *cui bono*?

On the whole, the bill displays great shrewdness in giving a quietus to a troublesome question. "If you want a Judge, why, pay him and keep him at home; when we want him we will send for him."

The Statute of Limitations and Crown Lands.

The rather unusual case has arisen in Manitoba of a dispute between two subjects as to title to land which was Crown land. The case is *Stover v. Marchaud*, at p. 193 of the Occasional Notes in this number. A mortgage was made on 2nd April, 1883, payable on 1st January, 1884, of land which had not at that time been patented. It was not paid at maturity, and the mortgagor died intestate on 1st October, 1884, leaving his widow and two children in possession. This possession by themselves and their servants was continuous down to the time of filing the bill for foreclosure, which was more than ten years from the maturing of the mortgage; but in the meantime, on 31st May, 1886, the patent issued to the widow and children. The Court, Killam, J., decided that the bill was an action or suit to recover land, and that the plaintiff's title was extinguished by the Statute of Limitations.

The decision is no doubt sound as to its being a suit to recover land. Both English and Ontario authorities have established this beyond controversy. But the decision on the Statute of Limitations seem to be contrary to Ontario authority long ago decided and acquiesced in. The decisions are *Jamieson v. Harker* and *Dowsett v. Cox*, 18 U. C. R. 590 and 594, respectively. The facts are not precisely the same as in the Manitoba cases, but the principle seems to be applicable. In the prior case, the plaintiff and defendants held the north and south halves of a lot as lessees of the Crown. The defendants enclosed part of the plaintiff's portion and held it for more than twenty years. Then patents issued to each for their respective halves, and the plaintiff, on discovering that the defendants were encroaching, brought an action for the part enclosed. The defendants set up the statute, but the Court held that it was no defence, as the fee was in the Crown.

In the second case, the plaintiff, a lessee of the Crown,

allowed the defendant to go into possession and hold the land for more than twenty years. Subsequently, the plaintiff obtained a patent and brought ejectment; and it was held, on the principle of the foregoing case, that the Statute of Limitations was no defence.

It may be that Mr. Justice Killam has distinguished these cases, as the note of this case is necessarily meagre, but at present they seem to apply.

Revision of the Rules.

Pursuant to the authority given by the Judicature Act as consolidated, a commission has been issued to a number of the Judges and some others to completely revise the Rules of Practice, and it is expected that the revision will be completed before vacation.

It has always been the opinion of the Bar that a committee of three, one of whom is a good draughtsman will do more effective and rapid work than a committee of a dozen, and we think that is the general experience. The first thing that a large committee does is to appoint a sub-committee, or sub-committees, to do the work and present it to the committee for approval or debate. All parliamentary work is so done. Why it seems necessary to have an unwieldy committee for the rules is a mystery. Without showing any disrespect for the Judges, we think we are right in saying that one or two Judges at most would be quite a sufficient number. Judges become rusty in practice as well as Barristers; and ninety-nine times out of a hundred the senior member of a firm has to consult the junior to ascertain what the practice is. To select members of the Bar who have long ceased to trouble themselves about questions of practice, in order to revise the practice, when the most capable talent can be drawn from the juniors who are every day engaged in practice and are thoroughly well versed in its theories, intricacies and needs, is surely unwise.

As to the Rules themselves, they might be reduced by one-half in number at least. They are full of directions

respecting the interior economy of offices which are not only entirely useless, but entirely inapt as rules of practice or procedure. They deal with matters of domestic concern, which are rigidly carried on in obedience to the rules and in many instances defeat the ends for which the offices exist. The whole economy of the offices might be dealt with on intelligent grounds without any rules at all. Now is the opportunity for getting rid of them and making the rules rules of practice pure and simple.

The Monroe Doctrine.

This famous "doctrine" is frequently referred to by the press of the United States as if it were a well established principle of international law, which all the nations of the earth would combine in enforcing against any one who committed an infraction of it. The fact is that it is a proposition of a policy outlined years ago by a distinguished statesman of the United States against the whole of the Eastern hemisphere, which therefore the nations of the earth would not be likely to combine in enforcing to their own detriment. The likelihood is that its particulars, and perhaps its name, are not known outside of the United States.

It was revived with some display pending the recent little difficulty which Great Britain had in South America, but not put practically in force, not being a practical measure. The best explanation of the whole "doctrine" is to be found in the American Law Review, May-June, of this year, under the caption, "What is the Monroe Doctrine." The learned writer dispels at once the idea that there is any obligation to prevent disputes in this hemisphere from being settled otherwise than by the United States. "The entent of the Monroe Doctrine is that it is the policy of the United States (1) not to interfere in the internal affairs of the governments of the old world; and (2) not to allow those governments to interfere with republics which have been established upon this continent

so far as to suppress their republican institutions or to attack the integrity of their territory." This is very clear. It is a mere matter of policy, and must necessarily remain so until it becomes a right established by treaty or by the consensus of nations or by the ability of the United States to force it on the world by arms. It is just as much a part of international law as the protective tariff of the United States, and no more. "It may be added," says the learned writer, "that the so-called Monroe Doctrine, while not established as a principle of international law, is so firmly embedded in the minds and hearts of the American people; that it may be regarded as an essential part of American patriotism." That may be perfectly true, but we think that the American people of the United States are too sensible to go to war with a European power for the sake of the American people of some petty republic, who would laugh in their sleeves at the United States for their kindness. We are much indebted to the American Law Review for the explanation given. Its predecessor, the Southern Law Review, some years ago, dealt very fully with the same question, and pointed out the fallacies of the popular idea. Coming from any other source than a United States source such an explanation would probably not have carried the weight that it does, and it is to be hoped that it will widely circulate in the lay press, and cause to cease those meaningless but irritating threats of enforcing what many people no doubt believe to be some pious canon of international law.

There are other views of the matter which will or will not bear enquiry, according to the point of view taken. The first is that the policy is based upon the non-interference of the United States in European affairs. As soon as the United States offer or concede on request their friendly offices in settling differences elsewhere in the world, the whole policy becomes baseless. That has already been done, and no pretext is therefore left for excluding either the friendly offices of, or the exercise of ordinary international rights by, European nations in this

hemisphere. The other consideration is that the policy postulates either a prior or preponderating right in this hemisphere to direct the policy of the world. What is its basis? Simply the laudable desire of the United States citizen to make his country the first power in the hemisphere, and to back up his desire with war, if necessary. Great Britain has a larger amount of territory in this hemisphere than the United States, has Imperial interests on this continent, and stands higher in moral and physical force in the scale of nations. Why is she to be excluded from consultation where she has such vast interests and can produce such a marked effect?

THE CANADIAN LAW TIMES

JULY, 1895.

VISITORS AND THEIR JURISDICTION.

RECENT events in connection with the University of Toronto have given a new interest to all questions touching the jurisdiction of the domestic tribunals which are charged with the government and discipline of educational institutions, and no part of that jurisdiction is more important or more interesting than that which pertains to the visitor.

All common law corporations are subject to visitation. In the case of ecclesiastical corporations, the bishop is the visitor of inferior spiritual corporations, such as deans, parsons, &c. The archbishops are the visitors of the bishops, and the king is visitor of the archbishop, while in the case of lay corporations the right of visitation depends upon the question whether the corporation is eleemosynary or civil. In the case of eleemosynary corporations, the founder, his heirs and assigns, are visitors, and upon failure of such visitor the king becomes visitor. In the case of civil corporations the king is the visitor, and his jurisdiction is exercised by the Lord Chancellor under the *Statute in that behalf made*. *Manual* (a).

Blackstone says that the jurisdiction of the king as visitor is exercised in the King's Bench, and there only; but in a note to this passage, at p. 481, he says that perhaps this notion is too refined, and that the jurisdiction of the King's Bench to regulate corporations is derived from its general

(a) Angell & Ames on Corporations, cap. 19; 1 Blk. Com. 480, et seq.; 2 Kent's Com. 300, et seq.; Grant on Corporations, 517, et seq.

superintendent authority when other jurisdictions are deficient, and that this regulatory power of the King's Bench is not derived from any visitatorial authority. This note and Mr. Christian's note thereto show why this must be so.

The king's visitatorial authority is now exercised in England by the Lord Chancellor under the Sign Manual (b).

This jurisdiction is not vested in the Court of Chancery or in the Lord Chancellor as a member of that Court, but is vested in the Lord Chancellor as the delegate of the Crown; therefore the Master of the Rolls refused to remove certain of the governors of Harrow School, upon the ground that jurisdiction in that respect was vested in the Lord Chancellor, and not in the Court (c).

In this Province there is only one instance in which the jurisdiction of the Lord Chancellor derived under the Sign Manual can be exercised by the Court, viz., in the case of lunatics. This jurisdiction is conferred upon the High Court of Justice by R. S. O. cap. 54, s. 2, which enacts that, "in the case of lunatics and their property and estates, the jurisdiction of the High Court shall include that which in England is conferred upon the Lord Chancellor by a commission from the Crown by the Sign Manual."

The visitatorial power of the Lord Chancellor is therefore not possessed by any of our Courts.

"There is a very essential difference between civil and eleemosynary corporations on this point of visitation. The power of visitors, strictly speaking, extends only to the latter; for though in England it is said that ecclesiastical corporations are under the jurisdiction of the bishop as visitor, yet this is not that visitatorial power of which we have been speaking, and which is discretionary, final, and conclusive. It is a part of the ecclesiastical policy of England, and does not apply to our religious corporations. The visitatorial power, therefore, with us applies only to

(b) *Ex p. Wrangham*, 2 Ves. at p. 619; and see *Re Christ's Church*, L. R. 1 Chy. 523.

(c) *Atty-Gen. v. Earl of Clarendon*, 17 Ves. at p. 498.

eleemosynary corporations. Civil corporations, whether public, as the corporations of towns and cities, or private, as bank, insurance, manufacturing, and other companies of the like nature, are not subject to this species of visitation. They are subject to the general law of the land, and amenable to the judicial tribunals for the exercise and the abuse of their powers" (*d*).

An eleemosynary corporation is such a corporation as is constituted for the perpetual distribution of the free alms or bounty of the founder to such persons as he has directed, such as hospitals for the relief of the poor, the sick, the impotent, and colleges for the promotion of piety and learning; and a corporation for religious and charitable purposes endowed solely by private benefactions is a private eleemosynary corporation, although created by a charter from the Government (*e*).

"It is understood that no other corporations go under the name of eleemosynary but colleges, schools and hospitals" (*f*).

For a discussion as to the class of institutions which may be termed eleemosynary, see judgment of Story, J., in *Allen v. McKean* (*g*), and see per C. J. Marshall, in *Dartmouth College v. Woodward* (*h*), which shows that if an institution is otherwise fitted to come within the term eleemosynary, it may, in so far as endowment is concerned, be endowed by the Government merely with a power to take property for its own purposes, upon the faith of which and of the provisions of the charter individuals bestow funds upon the institution.

"The *Inns of Court* are voluntary societies, and the decisions of the Benchers with regard to the disbenching and disbarring of their members are final and conclusive, *subject only to an appeal to the Lord Chancellor and the Judges as visitors*" (*i*).

(*d*) 2 Kent's Com. 304.

(*e*) Anderson's Dictionary of Law, Title, "Corporation."

(*f*) 2 Kent's Com. 300.

(*g*) *Bowdoin College Case*, 1 Sumner, 296 to 299.

(*h*) 4 Wheat. at p. 630.

(*i*) *Manisty v. Kenealy*, 24 W. R. 918.

This was so held on a demurrer to a pleading which *alleged that the Benchers were actuated by malice and had acted ex parte without sufficient reason and without giving an opportunity for a hearing* (j)

In *The Queen v. The Dean of Chester* (k), the *Court of Queen's Bench* refused to restore a chorister who had been removed by the Dean. Lord Campbell, C. J., at p. 520-21, says:—"It was contended before us that although Mr. Humphreys might have appealed to the visitor, he was not bound to do so, and that he may still call for the interference of this Court; but this notion of a concurrent jurisdiction is expressly contradicted by the language of Lord Hale in *Appleford's case* (l), and by the whole current of decisions upon the subject."

The visitor is a domestic tribunal possessing an extensive jurisdiction from which there is no appeal. Chief Justice Holt says:—"But you will say that the visitor has no Court, and it is unreasonable to conclude a man by the sentence of one that hath no Court. It is (I say) not material whether he hath a Court or no; all the matter is, whether he hath a jurisdiction; if he hath a jurisdiction and cognizance of the matter and person, and he giveth sentence in the matter, his sentence must make a vacancy, be it never so erroneous; but there is no appeal if the founder hath not thought fit to direct one. That an appeal lieth to the Common Law Courts of England is without precedent. It is plain by all the authorities of our books and by the way of pleading that the cause of the visitor's sentence is not examinable; if a sentence of deprivation be pleaded you need not shew the cause" (p).

This was a case in which the Bishop of Exeter as visitor of Exeter College removed the rector of that college. The rector applied to the King's Bench for redress against this motion, which was accorded by that Court, the Chief

(j) See also *Neate v. Denman*, L.R. 18 Eq. 127, to same effect.

(k) 15 Q. B. 513.

(l) 1 Mod. 82.

(p) *Phillips v. Bury*, 2 T. R. 346, and at pp. 353-4. See 1 Blk. Com. 483-4; 4 Mod. 106.

Justice (Sir John Holt) alone dissenting. The case was then brought into the House of Lords by writ of error, and that body concurred in Sir John Holt's judgment, and reversed the judgment of the Court of King's Bench (*q*).

Speaking of the power of a visitor, Lord Mansfield says:—"It is a *forum domesticum*, calculated to determine *sine strepitu* all disputes that arise within themselves, and the exercise of it is in no instance more convenient than in that of elections. If the learning, morals, or proprietary qualifications of students were determinable at common law, and subject to the same reviews as in legal actions, there would be the utmost confusion and uncertainty" (*m*). So the Courts have *no jurisdiction to grant a writ of mandamus to enforce the admission of a barrister by the Inns of Court*, and the only course open to the applicant is to appeal to the Judges as visitors of those societies (*n*). Nor will such a writ be granted to compel the Benchers of one of the Inns of Court to admit an individual as a member of the society with a view to his qualifying himself to be called to the bar (*o*).

In the case lastly referred to, Chief Justice Abbott said: "If the party now applying to the Court were an actually admitted member of the society, and had acquired an inchoate right capable of being perfected, it might then be fit for this Court (in the absence of any other remedy) to interfere by mandamus in order to perfect that right; but if the particular society improperly refuse to call a particular member to the bar, the remedy is not by mandamus, but by appeal to the twelve Judges. It has been argued that every individual has *prima facie* an inchoate right to be a member of one of these societies for the purpose of qualifying himself to practise as a barrister. If that proposition were established there would be a sufficient ground for granting a mandamus, but I apprehend that

(*q*) 1 Blk. Com. 484; see also *Rex v. The Bishop of Ely*, 5 T. R. 475.

(*m*) *The King v. The Bishop of Ely*, 1 Wm. Bl. at p. 82.

(*n*) *The King v. Gray's Inn*, 1 Doug. 353; and see *The King v. Barnard's Inn*, 5 Ad. & E. 17.

(*o*) *The King v. The Benchers of Lincoln's Inn*, 4 B. & C. 855.

there is no such inchoate right. It might as well be said that every individual had an inchoate right to be admitted a member of a college in either of the Universities, or of the College of Physicians, or any other establishment of that nature. But, supposing an individual were desirous to practise medicine in London, this Court would not grant a mandamus to compel the College of Physicians to admit him as one of their members or as a licentiate" (p). In the same case, Brayley, J., says:—"There may be a great difference between this case and one where a party has been admitted and suffered to incur expense for a length of time, and then applies to be called to the Bar. In that case he has an inchoate right to be called to the Bar. But then the remedy is not by mandamus, but by appeal to the twelve Judges" (q).

If a visitor refuses to exercise his visitatorial powers by receiving and hearing an appeal, the Court will grant a mandamus to compel him to exercise that power (r). The jurisdiction of the visitor extends not only over those who are already members of the visited institution, but also over those who seek admission to such membership (s). So also does his jurisdiction extend to the hearing of an appeal of an officer who has been amoved by some subordinate tribunal of the institution (t).

A. having obtained a gold medal from the University of London at their examination for the degree of Doctor of Laws, filed a bill to restrain them from giving another gold medal for the same examination to B. A demurrer thereto was allowed on the ground that *in matters relating to the internal management of a university the visitor has exclusive jurisdiction, and the Court will not interfere* (u).

(p) See also *The Queen v. Hertford College*, 3 Q. B. D. 693, and at p. 702.

(q) See also *Neate v. Denman*, L. R. 18 Eq. at p. 136.

(r) *The King v. The Bishop of Ely*, 5 T. R. 475.

(s) *The Queen v. Hertford College*, 3 Q. B. D. at p. 702.

(t) *Regina v. Dean of Chester*, 15 Q. B. at p. 518.

(u) *Thomson v. The University of London*, 10 Jur. N. S. 669.

The trustees of Queen's College, Kingston, in the exercise of their discretion, removed one of the professors from his professorship in that University, and it was held by the Court of Error and Appeal for this Province, reversing the judgment of the Court below, that the Court of Chancery had no jurisdiction to interfere for the restoration of the plaintiff, who contended that he was the holder of a freehold office, from which he could only be removed for impropriety of conduct, and not at the mere discretion of the trustees (*v*). Hagarty, J., delivering the judgment of the Court of Error and Appeal, says:—"The strong impression left on my mind is, that in all the cases in which a Court of Equity has interfered to restore an ejected officer, it has been on the ground that there was a right of some specific kind to moneys or lands appropriated to the office, as in the case of a schoolmaster to whom a revenue derived from a specific source, or a house, or rent, charge, etc., was directly appropriated, and this, as distinguished from a mere claim to be paid a stipend or allowance taken from some general fund. In other words, when the applicant can point to any specific moneys, or any rents, or lands, and say that money, rent or house was expressly set apart for me, as holding this office, and was held by others for the holder of the office; thus the Court finds the trust established, and assumes jurisdiction to prevent a wrongful disturbance of the officer. But when nothing but the right to receive a fixed stipend out of a common fund of an institution, applied to many various purposes, and especially for the performance of a duty not essential to the existence of the institution, there is nothing on which the Court can properly fasten a trust" (*w*).

Referring to the power of the visitor of the University of London, Kindersley, V.C., says:—"It is sufficiently established and well known that where there is a corporation of this nature, I might almost say of any nature, but, at all events, a corporation of this nature, or of any

(*v*) *Weir v. Mathieson*, 3 E. & A. 123.

(*w*) S. C. at p. 146.

nature analogous to this, with respect to which and over which there is a visitor, that then the line of demarcation between that class of questions which comes under the jurisdiction of the visitor on the one hand, and that class of cases which comes under the jurisdiction of this Court as a Court of Equity, on the other, is this—whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the visitor, and this Court will not interfere in those matters; but when it comes to a question of a right of property, or rights as between the University and a third person, de hors the University, or with regard, it may be, to any breach of trust committed by the corporation, that is, the University, and so on, or any contracts by the corporation, not being matters relating to the mere management and arrangement and details of their domus, then, indeed, this Court will interfere" (x).

Where the same persons are visitors and also have the management of the revenues, the Court has jurisdiction to prevent a breach of trust (y).

So also will the Court intervene to prevent a breach of trust by the governing body of a corporation having trust funds thereof in their possession, even though there be a visitor other than such governing body (z).

Where the governors of a grammar school had visitatorial powers, and were authorized to remove a master "*according to their sound discretion*," it was held that they could remove a master without summons or hearing, and although no charge against him had been exhibited to them, and that their discretion was not to be restricted by any opinion which the Court might form of the reasons on which they might have been induced to exercise it (a). But, on the other hand, where the trustees of a grammar

(x) Thomson v. The University of London, 33 L. J. Ch. at p. 634.

(y) Atty.-Genl. v. Lubbock, 1 C. P. Cooper 15, and see note on p. 35, *et seq.*

(z) Dangars v. Rivaz, 28 Beav. 233.

(a) Regina v. The Governors of Darlington School, 6 Q. B. 682.

school were authorized to remove the master at one meeting and confirm it at a subsequent special meeting, "upon such grounds as they should at their discretion *in the due exercise and execution of the powers and trusts reposed in them deem just*," it was held that this did not confer upon the trustees an arbitrary power to dismiss the master upon any grounds which they might deem just, free from any control of the Court, and that as no proper opportunity had been afforded to the master of defending himself, the trustees should be restrained from enforcing his dismissal and ejecting him (b). Lord Langdale, M.R., based his judgment in that case upon the ground that the power given to the trustees was not one to be exercised by them simply "as they at their discretion should deem just," but was one to be exercised in execution of the "powers and trusts reposed in them," and therefore he held that the power in question was a trust which would be enforced and controlled by the Court of Chancery.

Another instance in which the Court will interfere is thus stated by Sir John Romilly, M.R. :—"Where the Crown itself grants a charter of incorporation, or a charter appointing governors, and at the same time that it incorporates them, gives them the power to make rules, and all this with respect to a charity founded by somebody else; in that case the Court infers that the Crown does what the Court of Chancery would do by decree in any such case, viz., that it grants that charter with the view and intention of carrying into effect the views and wishes of the original founder; and accordingly when . . . the Court finds thereafter that those rules and those regulations do not carry into effect the views and wishes of the original founder, this Court interposes to make such a scheme for the purpose of furthering the intentions of the founder as may have been rendered necessary by the altered state of circumstances and the increased civilization of the country. That, I apprehend is the foundation of the jurisdiction which this Court exercises in those cases, and, accordingly,

(b) *Willis v. Childe*, 13 Beav. 117.

I have in a great number of instances interfered where there has been a charter of incorporation and a direction to the governors or persons to make rules, and I have directed a scheme where the altered circumstances of the charity have made it necessary for the purpose of carrying into effect the wishes and views of the original founder" (c).

"These foundations of colleges are to be considered in two views, viz., as they are corporations, and as they are eleemosynary. As eleemosynary they are the creatures of the founder; he may delegate his power either generally or specially; he may prescribe particular modes and manners as to the exercise of part of it. If he make a general visitor (as by the general words 'visitator sit') the person so constituted has all incidental power; but he may be restrained as to particular instances. The founder may appoint a special visitor for a particular purpose and no further. The founder may make a general visitor and yet appoint an inferior particular power to be executed without going to the visitor in the first instance" (d).

In the case of a private eleemosynary lay corporation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the king (e).

"Wherever the Crown founds a charity, this Court treats the Crown as a permanent authority and visitor of the charity, unless where the Crown has thought fit to appoint a special visitor; and in these cases it is necessary to apply to the Lord Chancellor by petition in his visitatorial character to exercise jurisdiction on behalf of the Crown as visitor. This jurisdiction is quite distinct from the ordinary jurisdiction exercised by the Court" (f).

(c) Per Sir John Romilly, M.R., in *Atty.-Genl. v. Dedham School*, 23 Beav. at p. 356.

(d) Per Lord Mansfield, in *St. John's College v. Todington*, 1 Burr. at p. 200.

(e) *The King v. St. Catherine's Hall*, 4 T. R. 233.

(f) Per Sir John Romilly, M.R., in *Atty.-Genl. v. Dedham School*, 23 Beav. at p. 356.

VISITORS AND THEIR JURISDICTION

Finding visitors, or persons with the powers as to matters of discipline, we must look to authorities at Common Law to ascertain the powers.

Where a person is constituted a visitor in he has plenary powers, and if his powers are way limited that must be expressed (g).

A visitor is a person having powers known

"The Court said that by being visitor *eo nomine* to determine all matters that come before him (unless he be particularly tied by statute), and that if he can put one out of his freehold *a fortiori* he may determine admission" (h).

Lord Chancellor Brougham says:—"No doubt what the powers of a visitor are. They are perfectly uncontrolled of removal, new variation, and alteration. They are in their extensive and arbitrary nature" (i).

The power of the Judges of the Court Bench as visitors of the Law Society of London was much discussed in the case of *The Hon. James v. The Judges of that Court* where the Judges of that Court were appointed visitors of the Law Society without the powers of the Society being defined. Wallbridge, C.J., delivering the judgment of the Court, says:—"A visitor of a corporation or Society is defined as follows: A visitor is a person authorized to visit a corporation or any institution for the purpose of seeing that the laws and regulations are observed, or that the duties and conditions imposed by the founder or by law are duly performed I hold that in the absence of any restriction or limitation of our powers as

(g) *The King v. The Bishop of Worcester*, 4 M. & W. 101.

(h) *The King and All Souls College, Skinner*, 13.

(i) *Atty.-Genl. v. The Archbishop of York*, 2 R. & B. 468.

(j) 3 Man. L. R. 367.

have the right to visit the society upon every matter in respect to which their Act of Incorporation gives them power to act. If, however, they should be found to have exceeded the powers conferred upon them by the Act of Incorporation, they would then be liable at law for such excess of authority, as in evidence of cases of corporations acting *ultra vires*, and could be restrained by injunction or be prosecuted for wrong done."

Taylor, J., in a dissenting judgment, refers to many authorities and says:—"From the examination of these authorities I have come to the conclusion that a visitor can exercise only the powers given to him by the instrument which appoints him visitor, or by statutes or rules passed by the institution visited, where there is power to pass such statutes or rules. The power of a visitor must be regulated according to the statutes of the college or customs of the place."

A visitor is to proceed summarily and simply, and not like a Judge upon the Bench, nor with the formalities of a Court (*k*).

Visitors proceeding in the usual course do not take evidence under oath (*l*).

A visitor need not hear parol evidence; it is sufficient if he receive the grounds of appeal and the answer thereto in writing (*m*).

"Visitors of colleges are not tied up to any particular forms, nor to be prohibited for irregularity in their proceedings or informality in their acts, but only for want of jurisdiction" (*n*).

Visitors may proceed upon evidence which would not be admissible according to the rules of law which govern the Courts (*o*).

(*k*) See *The King v. The Bishop of Ely*, 1 Wm. Blk. 82. *The Case of Queen's College, Cambridge*, Jacob, 19.

(*l*) Per Lord Mansfield in *Rex v. Gray's Inn*, 1 Doug. at p. 356.

(*m*) *Rex v. Bishop of Ely*, 5 T. R. 475.

(*n*) Head-note in *Bishop of Ely v. Bentley*, 2 Brown's Parl. Cases, 220.

(*o*) *Murdoch's Appeal*, 7 Pick. at p 332.

Where the trustees of the Theological Institution in Phillips' Academy in Andover removed a professor of the institution, and he thereupon appealed to the visitors, who heard the whole case anew and affirmed the action of the trustees, it was held upon an appeal to the Court that any irregularity or injustice in the proceedings before the trustees was immaterial, their sentence being entirely vacated by the appeal to the visitors. It was also held that it was not necessary for the visitors to conduct the appeal with open doors, nor was it necessary to admit more than one witness to be present at a time, but that before the visitors could try and remove a professor from his office for misconduct, it was necessary that the offence with which he was charged should be fully and plainly, substantially and formally described to him (*r*).

The visitors of a corporation cannot exercise their visitatorial power over their own body, that is, they cannot be both visitors and visited, therefore they cannot exercise their power of amotion by removing a member of their own body (*s*).

It is laid down in some of the cases that no person is entitled to bring a complaint before the visitor unless the complainant be a member of the corporation (*t*).

A visitor, however, may exercise his visitatorial power whenever he sees cause, and without any complaint being brought before him by a member of the corporation, unless the occasions of his visitation are limited or restricted by the terms of his appointment (*u*).

"Where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character" (*v*).

Where the charter of a University did not specifically name a visitor, but it appointed a board of trustees in which

(*r*) *Murdoch's Appeal*, 7 Pick. 303.

(*s*) *Fuller v. Plainfield Academic School*, 6 Conn. 545.

(*t*) See *Rex v. Grundon*, Cowp. at pp. 319 to 321.

(*u*) *Phillips v. Bury*, 2 T. R. at p. 358.

(*v*) *Per Story, J.*, in *Dartmouth College v. Woodward*, 4 Wheat. at p. 675.

was vested those powers of domestic control which are usually exercised by visitors, it was held that the board of trustees was in effect constituted visitors of the corporation (*w*).

The Law Society of Upper Canada appears to be a private eleemosynary corporation which is subject to visitatorial jurisdiction.

The Law Society was first incorporated by 37 Geo. III. cap. 13, the first section of which enacts that:—"It shall and may be lawful for the persons now admitted to practise in the law and practise at the Bar of any of His Majesty's Courts of this Province, to form themselves into a society, to be called The Law Society of Upper Canada, as well for the establishing of order among themselves as for the purpose of securing to the Province and the profession a learned and honourable body to assist their fellow-subjects as occasion may require, and to support and maintain the Constitution of the said Province."

Section 2 provides that the Judges of the Province for the time being shall be the visitors of the society.

Section 4 provides that "It shall and may be lawful to and for every person now practising at the Bar of any of His Majesty's Courts to take one pupil or clerk for the purpose of instructing him in the knowledge of the law."

Geo. IV. sess. 2, cap. 5, enacts that the Treasurer and Benchers of the Law Society for the time being and their successors to be appointed according to the rules of the said society shall be a body corporate by the name of The Law Society of Upper Canada.

By 13 and 14 Vict. cap. 51, sec. 2, it is provided that:—"The Chief Justice of Upper Canada for the time being, the Chancellor of Upper Canada for the time being, and all the puisne Judges and Vice-Chancellors of Her Majesty's Superior Courts of Law and Equity at Toronto for the time being, shall be and shall be deemed to have been visitors of the Law Society of Upper Canada, with all the

(*w*) *Weir v. Mathieson*, 3 E. & A. 123; and see *The King v. The Bishop of Ely*, 1 Wm. Bl. at pp. 83 to 85.

powers conferred upon the Judges of Upper Canada with respect to such society in and by the second section of the Act of the Parliament of that Province passed in the 37th year of the reign of King George the Third, chaptered Thirteen."

The Crown endowed the Law Society for the purpose of enabling it to provide accommodation for the Courts, as follows:—9 Vict. cap. 33, £6,000; 18 Vict. cap. 122, £10,000; 20 Vict. cap. 64, £10,000; 22 Vict. cap. 31, £30,000.

The Act respecting the Law Society of Upper Canada is now known as cap. 145 of R. S. O. (1887).

Section 2 of the Act provides that the Treasurer and Benchers and their successors shall continue to be a body corporate, and authorizes them to acquire and sell lands for the purposes of the Society.

By section 52 the Crown endows the Society with the right to raise a revenue by levying fees on the members of the Society.

Section 48 authorizes the establishment of a Widows and Orphans Law Benevolent Fund.

Section 38 authorized the establishment of a Law School with scholarships in connection therewith.

Section 3 provides that "The Judges of the Supreme Court of Judicature shall be visitors of the society."

Section 44 provides that :—" Whenever a person being a Barrister or a Solicitor of the Supreme Court of Ontario, or a Student-at-law or Solicitor's Clerk serving under articles has been or may hereafter be found by the Benchers of the Law Society, after due enquiry by a committee of their number or otherwise, guilty of professional misconduct, or of conduct unbecoming a Barrister, Solicitor, Student-at-law or articulated clerk, it shall be lawful for the said Benchers in Convocation to disbar any such Barrister, and to resolve that any such Solicitor is unworthy to practise as such Solicitor: to expel from the society and the membership thereof such student or

articled clerk, and to strike his name from the books of the society; and to refuse either absolutely or for a limited period to admit such articled clerk to the usual examinations, or to grant him the certificate of fitness necessary to enable him to be admitted to practise."

Section 45 provides that all the rights and privileges of a Barrister shall cease upon his being disbarred, and section 46 provides a method for striking a solicitor off the rolls of the Court when Convocation has resolved that he is unworthy to practise.

Section 47 is in the following words:—"Any powers which the visitors of the Law Society may have in the *said matters of discipline* are hereby vested in the Benchers of the Law Society, and the powers by the preceding three sections of this Act given to the said Benchers may be exercised by them without reference to or concurrence by the visitors."

That is, the Benchers may exercise the powers granted by section 44, and the power to give effect to their order of disbarment and resolution as set out in sections 45 and 46, and they *may also exercise all the powers which the visitors have in the said matters of discipline*. Presumably all the visitatorial powers of the Judges other than those pertaining to "the said matters of discipline" still remain vested in the Judges.

The matters of discipline referred to are those which are mentioned in section 44. Therefore the Benchers have all the powers of the visitors with regard to professional misconduct, and with regard to conduct unbecoming a Barrister, Solicitor, Student-at-Law, or Solicitor's Clerk.

The section giving the Benchers the visitatorial powers of the Judges was the last section of the Act of 1881 (44 Vict. cap. 17), which gave the Benchers power to disbar, and that Act is to be looked at for the purpose of construing the present Revised Statute, and it shows that "the said matters of discipline" are those referred to in the

present section 44. The result then is that the *Benchers may exercise the powers granted by section 44* without any reference to the visitors, and *they may also exercise all the powers of the visitors* with regard to the said matters of discipline which are dealt with in section 44.

The University of Toronto is an institution incorporated by Royal Charter, and subject to the provisions of R. S. O. (1887), cap. 230, and amending Acts.

Section 4 of the principal Act is as follows:—"The Lieutenant-Governor shall be the visitor of the University on behalf of the Crown, and his visitatorial powers may be exercised by Commission under the Great Seal, and the proceedings of any commission, having been first confirmed by the Lieutenant-Governor, shall be binding on the University and its members and on all persons whomsoever."

Under the law relating to Public Schools in the Province there is a power granted to the Minister of Education which is closely analogous to a visitatorial power. The Public Schools Act of 1891 gives very wide powers of management and control to the Public Schools Inspectors, and The Education Department Act (1891) provides that "The Minister of Education shall have power to decide upon all disputes and complaints laid before him, the settlement of which is not otherwise provided for by law, and upon all appeals made to him from the decision of any inspector or other school officer."

A. H. MARSH.

EDITORIAL REVIEW.

Remedial Legislation.

The reply of the Legislature of Manitoba to the remedial order of the Governor-General in Council raises two important constitutional points in connection with the subject of remedial legislation which we have already referred to. The first is that the power of taxation is one with which there is absolutely no power to deal on an appeal under the education clauses of the Manitoba Act, and, inasmuch as the rates can be supplied only by the voluntary action of the Provincial Legislature, the point is submitted for consideration. The other is that any grant of public money must be by the voluntary action of the Legislature, and no appeal would lie in that matter.

These two matters deserve very serious consideration; and, if they are well taken, they disclose a serious defect in the constitution in so far as the remedial power of the Parliament of Canada is concerned.

We pointed out in a former number, that the order might be complied with by simply passing an Act authorizing the establishment of separate schools without giving the power to levy rates for them—in other words, the order might be obeyed by permitting the establishment of voluntary schools, for which purpose, of course, an Act of the Legislature would not be necessary. The Legislature, in its reply, points out that separate schools would not be effectively established without being accompanied by the power to raise taxes for their maintenance, that no appeal lies from the Act of the Legislature relating to assessment

and taxes, and there is no right in the Governor-General in Council to order the Legislature to levy rates.

There is no doubt that the point is an exceedingly strong one and sufficiently serious to require a pause in the proceedings for its earnest consideration. It is clear that the order falls short of expressly requiring rates to be levied. It is clear, however, by the reference to the prior legislation that the Governor-General in Council intended the separate school system to be based financially upon public taxes. And although the order professes not to interfere with the public school system as established, but requires only that it should be "supplemented" by additional measures for the creation of separate schools, it is abundantly evident that every separate school which is established must, if supported out of public taxes, disturb the balance and interfere with the assessment for public schools. A supporter of separate schools must either bear the public school tax and the separate school tax in addition thereto, or the taxes of the supporters of separate schools must be shifted altogether to the shoulders of the public school supporters. In either case there is involved the necessity of interfering directly with the system of taxation in the Province. Upon the refusal of the Provincial Legislature to revise their system of taxation and voluntarily adjust it to suit the requirements of an Act of the Parliament of Canada, there would arise the serious question put by the Provincial Legislature, as to how far the Dominion Parliament could go, in not only levying a tax for separate schools, but adjusting the Provincial system of assessment to the needs of the Dominion Act. In connection with this the very vague terms of the order raise a serious difficulty. No mode or method of taxation is provided for, nor is it even suggested that there should be a rate levied, unless the reference to the former system be considered a sufficiently definite order to require the same system of taxation. Here then is scope for argument as to the mode by which the Dominion should provide for rates, even supposing that it has the jurisdiction. The Par-

liament of Canada has jurisdiction only to pass an Act to carry out the remedial order, and if that order is ambiguous, the exercise of the jurisdiction must necessarily be uncertain also.

As to the other point presented, the contention of the Province seems to be absolutely clear. It is not bound, of course, to provide a public grant for schools, and it may benefit the schools in an indirect way without disobeying the order. But it may apparently give a public grant and disobey the order directly without any remedy being applied. It is a fundamental constitutional principle that the popular branch of Parliament is absolutely free from control in dealing with money bills. How then can the Parliament of Canada interfere to divert a portion of the moneys granted in and for a particular manner and purpose to another purpose? The contention seems more clear than the first. For it is conceivable that the Dominion Parliament might interfere to re-adjust the taxation of the whole Province so as to provide for separate schools; but it is inconceivable that it should attempt to reduce the Legislature of Manitoba to vassalism. If the Legislature chooses to say that it will not grant anything to schools, or will grant sums to schools A., B. and C. only, how can the funds so provided be diverted or increased, or how can the Legislature be compelled to vote money which it refuses to vote?

The answer, if negotiations are opened, will be interesting. If legislation is determined on by the Parliament of Canada the debate will be probably the most interesting, from a constitutional point of view, that has arisen since the Union.

Equally interesting is the position of the Government, its obligation with regard to the remedial order and its responsibility to Parliament therefor. When the late Minister of Justice enunciated the proposition, that, in hearing the appeal from Manitoba, the Cabinet were acting in a judicial capacity, we took occasion to dispute this

position and to point out that, under our present system of constitutional government, no judicial functions were performed by the Cabinet whatever (13 C. L. T. 46). The printed report of the proceedings of the Judicial Committee of the Privy Council shows that this matter was thoroughly canvassed there, and it was iterated and reiterated by their Lordships and the counsel engaged that the Government of Canada in hearing the appeal would act in a political, and not a judicial, capacity. Considering that the report of the Cabinet to His Excellency reasserts that they were acting in a judicial capacity, it seems clear that the proceedings before the Judicial Committee could not have been read by the Canadian Ministers before acquiescing in this report. If they had read them, it is an important deliverance which they completely ignored.

The order having been made, and the answer of Manitoba being practically a refusal, the question arises now as to whether any remedial legislation which is introduced into Parliament should be a Government measure or not. It has been asserted by supporters of the present Government that they are under no responsibility to Parliament whatever, that the Manitoba Act gives jurisdiction to Parliament to pass legislation, and that it is for some member, in his capacity as private member, to introduce legislation for the consideration of Parliament. On the question of constitutional practice, apart altogether from political tactics, we must dissent from this view. The jurisdiction is acquired by Parliament only upon the political action of advising a remedial order, followed by explicit disobedience. In other words, the Government of the day is responsible to Parliament for having given it jurisdiction. If Parliament rejects a bill brought in to carry out the order, whether at the instance of a private member or not, it is practically a condemnation of the action of the Ministry in advising the order. That is to say, in setting the matter in train for Parliament to deal with, the Government is not honoured with the confidence of Parliament.

Upon the whole, although the situation is a unique one in constitutional law and Parliamentary practice, there seems to be no way by which the responsibility of initiating the matter, as a question of Dominion politics, can be avoided by the Ministry of the day to whose lot it has fallen to deal with the question.

The Authority and Privilege of Counsel.

An important case on the authority of counsel in settling a case, and of his privilege in stating the facts thereafter, appears in The Reports for May. In *Kempshall v. Holland*, 14 R. May, 296, it appeared that a breach of promise case was settled by the agreement of counsel upon the terms that a sum of money should be paid by the defendant to the plaintiff, judgment should be entered for the defendant, letters written by the defendant to the plaintiff should be delivered up, and the plaintiff should not molest the defendant. On a motion for a new trial on the ground that the settlement was arrived at without the plaintiff's consent, the Court of Appeal held that the settlement included two things not within the scope of counsel's authority, viz., the giving up of the letters and the forbearance to molest the defendant. These matters were not in question in the action; no judgment or verdict could have been given on them, and they were therefore not within counsel's authority. The entry of judgment for the defendant was held to be within counsel's authority as not being outside the scope of the action. The result seems not a little peculiar. Counsel may well say: "If you will give my client some valuable thing not in question in this action, I will agree to a small verdict." The agreement to the verdict is valid because within the scope of the action; but the consideration for it not being within the scope of the action renders the whole settlement, otherwise good, completely null and void. Equally peculiar seems the other holding: "I will give you a small sum if you will let me enter judgment that you are to have nothing." This is

valid. Under the circumstances, if any outside matter is imported into any settlement by counsel, however trivial it may be, so long as it is an element in the settlement it destroys the authority of counsel, and the consent of the client must be obtained.

On the question of one of the privileges of counsel the same case gives no uncertain sound.

It is undoubted that it is the privilege of a barrister to decline to be sworn as to what has taken place in the course of a matter in which he has acted as counsel. A certificate of what took place is substituted. But in this case the Court of Appeal asserted the privilege and refused to hear an affidavit. Lord Esher, M.R., said: "It is not the practice of this Court to allow an affidavit by counsel as to matters that occurred within his knowledge as counsel at a trial to be read. The Court places implicit confidence in the statement of a counsel; and when the Court requires information from a learned counsel as to anything that has taken place in a case in which he appeared, our practice is to ask the counsel to attend and state to the Court what occurred."

Judgments and Hot Weather.

The practice of delivering judgments a day or two before vacation has the advantage of clearing the Judges' tables of arrears, but is accompanied by disadvantages to the profession and public.

The disadvantage to the profession is slight—the herding together of a great number in a hot room—worse situations have to be endured. But the disadvantage to the public is the impossibility in most cases of signing judgment and securing the fruits of the litigation. Even where the case is a perfectly simple one it is sometimes impossible to get judgments entered and costs taxed before vacation, and where there are complications in the judgments delay is always certain. The result is that the losing

party gets two months' warning of his obligation to answer the judgments and two months within which to dispose of his property if so minded. Of course it may be said that we must assume men to be honest; but for practical purposes that assumption will not answer as long as men have to be sued for the performance of their obligations.

We understand that one of the Divisions will deliver a number of judgments during vacation. No practical use can be made of them by the successful parties, and the only result will be as we have mentioned. It would be much more satisfactory to the whole profession to have the delivery of judgments postponed to a day after vacation, unless time be given to put into concrete shape those delivered just before vacation.

THE CANADIAN LAW TIMES

AUGUST, 1895.

ONTARIO LEGISLATION, 1895.

THE dying Legislature distinguished itself last year by leaving on the statute books a number of crudely drawn Acts, and by displaying a number of mistakes in legislation, the origin of which was entirely inexplicable. The new Legislature has made a bold dash at reforming the law by consolidating the Judicature Act and amending Acts, and passing the Law Courts Act for the alleged reform of the law and procedure, and the Settled Estates Act, the need of which has been much felt in past years. As usual, amendments are found to the Registry Act, the Assessment Act, the Chattel Mortgage Act, the Dower Act, the Landlord and Tenant Act, the Assignments Act, and the modest but ever-present Line Fences and Ditches and Watercourses Acts. We must not forget that the Municipal Act and Assessment Acts receive their annual amendments.

Chapter two of the statutes of the year legalize railway time, which has been in common use ever since the railway companies adopted it. The Act is retrospective as well as prospective, and consequently in every Act of the Legislature and every deed or other "legal instrument," the time referred to means Standard time, which, for part of the Province, is five hours behind Greenwich time, and, for part, six hours behind Greenwich time, the meridian of 87 degrees west longitude being the dividing line. The twenty-four hours' notation is also permitted by the same statute.

Chapter six provides for making the county or district Attorney sheriff or registrar *pro tempore* in case of the death, resignation or removal of the sheriff or registrar, if at the time there is no deputy. In connection with this Act reference may be had to the Interpretation Act, section 8, sub-section 27, whereby words empowering a public officer to do anything include his successors and a deputy; and also to R. S. O. cap. 16, sec. 50, which provides that a deputy-sheriff may make a deed of conveyance in case of a sale by the sheriff, where the sheriff has died, resigned or been removed; and to the following cases:—*Doe d. Tiffany v. Miller*, 5 U. C. R. 432, and *Miller v. Stitt*, 17 C. P. 559. Power is given by this statute to the county attorney also to appoint a deputy, and he is also made responsible for the management of the office.

The Succession Duty Act is amended by including therein all property situate within the Province, whether the owner was domiciled in or out of Ontario at the time of his death. By the principal Act, the property was liable to duty only where the deceased was domiciled in Ontario at the time of his death, or had been so five years previous thereto. The scope of the Act is further enlarged by making it applicable to any portion of the estate of a deceased person in a foreign country which is brought into the Province by the executors or administrators of the estate, to be administered or distributed in the Province. The excess of the Ontario duty only over the foreign duty is to be paid if the property has paid the foreign duty. A question may arise as to the interpretation of this clause, inasmuch as it declares that if "any portion of the estate" is brought into the Province it is subject to duty. It may be that, as statutes imposing a tax are construed strictly, the tax would only be levied where the property is brought in in specie, and not when it has been converted into money and the money brought in; which would altogether exempt from duty the proceeds of real estate. This ambiguity could easily have been avoided by declaring that any portion of the estate, or the proceeds thereof, should be liable to the duty.

We now arrive at the Consolidated Judicature Act, which, according to the first section, is not to go into effect until the proclamation of the Lieutenant-Governor, on or after September 1st. This Act displays one of the curiosities of legislation which we would be glad to think, for the benefit of other people, is confined to this Province. While the Act brings together all existing statutes amending the Judicature Act, it includes quite a large body of new legislation passed in the same session. Thus we have in the statute book a number of enactments contained in several independent statutes and repeated in the Judicature Act. Possibly no difficulty would have arisen from this circumstance, had it not been for the fact that the coming into force of the Judicature Act containing these enactments is postponed, while parts of the statutes themselves lying alongside their consolidation come into force immediately.

What the effect of this will be it would be unsafe to prophesy. As a critic, we can only say that it looks like a pretty mess; as a practitioner, one can see in it hosts of bills of costs; for the unfortunate suitor, we see nothing but vexation of spirit, for which it will not soothe him to be told his representatives in the Legislature are responsible.

The first noticeable alteration in the Act is section 11 (2), as to the Court of Appeal. In the case of appeals from one Judge "sitting in Court or otherwise," three Judges of the Court of Appeal form a quorum. Although this would appear to give a great measure of relief, it is doubtful whether it has the extended scope which it presents at first sight. The clause was probably drawn with the present practice in mind, by which an appeal from a Judge sitting in Court at Osgoode Hall must necessarily go to the Court of Appeal. The draughtsman has apparently overlooked the fact that by section 71 an appeal from a Judge in Court lies to a Divisional Court as well as to the Court of Appeal. The only cases thus affected are those cases in which the Court of Appeal will be chosen instead of the Divisional Court. The choice of the Court of Ap-

peal may probably be influenced by the fact that a further appeal can be taken to the Supreme Court from that Court, whereas an appeal will not lie from a Divisional Court except in certain cases. The "otherwise" which the Act speaks of does not exist, for no appeal lies to the Court of Appeal from a Judge sitting otherwise than in Court. It is a question whether it includes the case of an appeal from a Judge at the trial. This was probably not intended to be included at all by this clause, as in section 72 that case is not included in the case of a Judge sitting in Court, but is treated as a separate kind of appeal.

By section 14, the Chief Justices and Chancellor are made *ex officio* Judges to sit in the Court of Appeal when there is a vacancy, unless some other Judge is chosen. Hitherto there has been a doubt as to the right of precedence of the Chief Justices of the High Court and the Justices of the Court of Appeal, which doubt not having been resolved has frequently prevented the composition of the Court of Appeal with these Judges. As the present statute permits the Judges of the High Court to choose other Judges to sit instead of the Chief Justices, this course will probably be still adopted, and the doubt still remain unsolved.

By section 63, the three several Divisions of the High Court are not to sit or give judgments as Divisions (except for the purposes of the Criminal Code), and there are not to be Divisional Courts of the Divisions. Henceforth all Divisional Courts are to be Divisional Courts of the High Court without reference to the Divisions. This far-reaching enactment will produce no further practical effect than to change the phrase "the Divisional Court" into "a Divisional Court." The same Judges are free to sit as before, although they sit under another name.

By section 64, a Divisional Court is to sit every month on the first Monday of the month, and continue until business is disposed of; and by section 66, every Divisional Court is to consist of three Judges. The monthly sittings of the Court were strongly recommended by the Bar Com-

mittee in 1888, when the rules were being revised, but the Judges did not accede to the proposal. We believe that since then many, if not most, of them have been convinced of the usefulness of this proposal for the dispatch of business, and in fact, advocate the change.

We now come to the subject of appeals, which is thrown into some confusion by the joining together of apparently independent enactments. By section 70, except in Crown cases, there shall be only one appeal from any judgment or order. By section 71, all appeals are to be to a Divisional Court in the first place. By section 72, it is, in a most extraordinary manner, enacted that, subject to the exceptions and provisions in the Act, an appeal shall lie to the Court of Appeal from every judgment, order or decision of the High Court, whether of the Divisional Court or of the High Court, and including cases tried with a jury where the appellant asks for a new trial. And by section 73, it is again, in a most contradictory fashion, enacted that no appeal shall lie from a Divisional Court, except in the cases mentioned in that section. One would have thought it to be the duty of a draughtsman, not merely to throw together such clauses, but to use such mental powers as he was gifted with in harmonizing sections which appear to be contradictory when laid side by side. If these sections had been harmonized, a great deal of doubt would have been allayed in an authoritative manner. As they stand they must run the gauntlet of the Courts, and, on the very question of what the meaning of a clause is, a doubt will arise as to whether an appellate Court can authoritatively settle the question.

We shall endeavour, however, to arrive at some systematic way of dealing with appeals under these clauses by taking a hypothetical case from its beginning. In the first place, by section 71, all the following appeals, instead of proceeding as at present, go to a Divisional Court, namely, from a Judge in Chambers, from a judgment or order of the Master in Ordinary, the Master in Chambers, a Local Judge, a District Judge, a Stipendary Magistrate and a Local

Master, from the reports of Masters and Official Referees, from the judgment or order of a Judge of the High Court in Court. This takes away from the weekly Court business all appeals from Masters' reports, all appeals from Local Judges, all appeals from Chambers; and takes away from the Court of Appeal all appeals from a Judge in Court where the appellant elects to appeal to a Divisional Court. The latter case is the only distinctly beneficial part of this enactment, for it was a crying evil that an important decision of a Judge in Court could never be reviewed, except through the laborious and sometimes prohibitory procedure required to get to the Court of Appeal.

Recurring again to the scope of the section, it comprehends all business except appeals from judgments at trials. Following this, section 70 enacts that there shall not be more than one appeal. And we may therefore take it that, once an appeal is taken to a Divisional Court in any case save that of an appeal from a judgment at the trial, appeals must cease when a Divisional Court has disposed of the case, unless the succeeding sections will permit one. We have now to look at sections 72 and 73 to ascertain whether such appeals will lie. Section 72 makes an appeal lie in every case whether the judgment is that of a Divisional Court, or of a Judge in Court, and including cases tried by jury where a new trial is asked. The first thing to be observed with regard to this clause is that appeals are divided into two classes: the first, appeals from a Divisional Court; the second, appeals from a Judge in Court. Dealing with the second class first, we have two enactments on the subject. Section 71 declares that an appeal from a Judge in Court shall be to a Divisional Court instead of, as at present, to the Court of Appeal. Section 70 enacts that that shall be the only appeal. Section 72 enacts that an appeal shall lie to the Court of Appeal from every judgment, order or decision of a Judge in Court. The only way of harmonizing these sections seems to be to treat section 71 as not excluding an appeal to the Court of Appeal, but as giving an additional right to appeal to a Divisional Court from a Judge in Court. Reading the two

together, it gives the choice as to whether one will go to the Court of Appeal or a Divisional Court. Now, where an appeal has been taken from a Judge in Court to a Divisional Court, if section 70 is to apply, then no further appeal will lie to the Court of Appeal. But section 72 enacts that an appeal will lie from every judgment, order or decision of a Divisional Court subject to the exceptions and provisions contained in the Act. Now, an exception must be of a part of the whole matter and not the whole matter itself. Therefore it cannot be that the interpretation of sections 70 and 72 is, that an appeal shall lie from every judgment of a Divisional Court in appeal from a Judge in Court, except where an appeal has been taken to the Divisional Court; because the exception there would include the whole. The exceptions must refer to those mentioned in section 73. And it would also appear that cases of the kind we are considering are specially provided for by sub-section 2 of section 73, which provides that in case where an appeal lies to the Court of Appeal, as well as to a Divisional Court, no appeal can be taken to the Court of Appeal if the appellant has gone to a Divisional Court and been unsuccessful. Taking this clause as the enactment particularly applicable to such cases, we have another interpretation as to the right to appeal; namely, that where an appellant from a Judge in Court is unsuccessful before a Divisional Court, he cannot appeal to the Court of Appeal. He has a double prohibition before him. Section 70 says, there shall be one appeal only, and he has had one. Section 72 says, he shall have an appeal except in certain cases; and one of the certain cases is where he is unsuccessful. If he is successful, his opponent, under this clause, may appeal, unless he is stopped by section 70, which says, that there shall be but one appeal from any judgment. This would be unfair, however, and would seem to indicate that one appeal means one appeal by the same appellant. The matter is further complicated by the other sub-sections of section 73, which give the opportunity of making an application for special leave to appeal to the Court whose judgment is in question, or the Court of Appeal

or a Judge thereof; and the cases in which leave may be granted are further limited to cases where the matter in controversy exceeds one thousand dollars, and some other cases.

We shall attempt to summarize now the procedure as to appeals under these sections.

1. Appeals from single Court may be to a Divisional Court (section 71 (3)), or to to the Court of Appeal (section 72).

2. No further appeal (section 70), unless the case falls within exceptions contained in section 73 (section 72).

(a) If appellant successful, respondent may appeal (section 73 (2)).

(b) Appeal may be upon leave given (section 73 (3)), which shall be discretionary (section 73 (4)), but is confined to cases following.

(c) Where the matter in controversy exceeds \$1,000, or affects the validity of a patent, or is on a question of law of practice on which there have been conflicting decisions, or where there are "sufficient special reasons," which will include almost every case in which one wants to appeal.

3. Appeals from trials as heretofore, subject to the restrictions contained in section 73.

The meaning of section 70, limiting the right of appeal to one appeal, if it is to have any signification, must either be read as entirely prohibitory of all appeals after an appeal to a Divisional Court, or must be read as a general statement of law to be taken subject to the cases mentioned in section 72 and section 73 as exceptions therefrom. In this connection it really has no meaning and might well have been omitted.

By sections 77 and 78, the cumbersome and almost prohibitory regulations as to security and printing, in cases of appeal to the Court of Appeal, are abolished, except where special application is made therefor.

The provision whereby the mere notice of appeal and setting down stays the writ of execution is not to be

commended. If any provision had been sought for in order to encourage unfounded appeals, no better could have been selected than the present provision. Anyone affected by a judgment formerly had to give security for the due execution of the judgment before execution was stayed, the appeal to the Court of Appeal being a mere step in the cause. Now, the mere giving of a notice, setting down of the appeal and notice to the sheriff, all of which can be done at a very slight expense, automatically stay the execution, and give every encouragement to one who is condemned in any appealable decision to secure breathing time and a stay of execution by his own act. The only method of disposing of the stay is to make an application to the Court or Judge; and then, curiously enough, the Judge has power to impose terms on making the order, as if the successful party to the litigation were a culprit who had to ask the leave of the Court to secure the fruits of his judgment, and to submit to terms as the price of his order. It will no doubt be said that the clause means that terms shall be imposed on the appellant. But the grammatical and sensible construction of the clause is exactly the opposite. There was no reason nor necessity, and there is no justice, in the alteration made by this clause, abolishing the process by which security had to be first given as the price of a stay.

We have already referred to the extraordinary provisions contained in section 79, the meaning of which is very difficult to ascertain, and which are sure to occasion difficulty in ascertaining the value of any decision.

By section 87 (2), further restrictions are placed upon a Judge as to the hours of holding sittings. They are not to begin before nine in the morning nor extend beyond seven in the evening, except for special reasons, with at least a half hour's intermission at or near noon. It is easy to find special reasons for anything. Whether it is an ordinary or a special reason that the Judge has to leave for another Assize the next day, would be hard to determine

as a matter of theory; but as a matter of practice, no doubt it will be considered a special reason for sitting after seven.

Section 112 contains a provision entirely novel to our law, but one which will probably be beneficial. In all civil cases, it shall be sufficient if ten of the jurors agree instead of twelve. This will secure a better result in that class of cases in which juries have hitherto been prone to disagree. By section 113, if a juror dies or becomes incapacitated during the trial, or if it is discovered that one of the jurors is a relative of a party to the suit within the degree of first cousin, he may be discharged, and the Judge may proceed upon such terms as he thinks fit with eleven jurors. Although this is theoretically a just procedure, it may produce the very result which was intended to be obviated by the preceding section. If it could always be secured that the retiring juror was one of the recalcitrants, no injury would be done; but it is possible that one of the jurors that would secure a verdict of ten may be thus removed. A word may be said about the mode in which the relationship is described by this section. Why the draughtsmen should have chosen the clumsy expression "within the degree of first cousin" is beyond comprehension. A first cousin is as likely to be biased as an uncle: yet apparently he is not disqualified, if the clause means what it says, that only relatives within this degree are disqualified. The more comprehensive and rational way of describing the relationship would be, "all the relatives, to and inclusive of the fourth degree of consanguinity and affinity," which would include, without any kind of doubt, a first cousin and all within the same degree. Under the present definition, it will be exceedingly doubtful whether any connections by affinity would be included. For instance, a brother-in-law, who is within the fourth degree of affinity, is not necessarily comprehended within a term which refers to a consanguineous relative as determining the scope of the statute. Such cases may not fall within this clause, and they will have to proceed and the verdicts be moved against on that ground.

By section 115, a further attempt has been made to fix the place of trial. Every action is to be tried in the county in which the cause of action arises, provided that all parties reside in that county. No doubt this will include a very large number of cases, but it will revive the old discussion as to where a cause of action arises, where the making of a contract and the breach are in different counties.

By section 74, service out of the jurisdiction is to be allowed where it appears that the plaintiff has a good cause of action against the defendant upon a contract or judgment, and that the defendant has \$200 worth of exigible assets in the Province. This provision was omitted by mistake in the revision of 1888 and is now restored.

By section 125, the attendance of a party for examination may be secured by service of his solicitor with an appointment, and payment to him of conduct money. Though this may be a convenient arrangement, the default of the party could hardly be punished by committal, unless it were clearly and unmistakably proved that the notice was brought home to him.

Section 128 is an instance of careless drafting. It provides that where an order for payment out of Court is made by an authority other than a Judge of the High Court, it must be approved or initialed by a Judge of the High Court before the accountant can act upon it. The word "Supreme" should have been used instead of "High," in order to avoid the result of the section in its present state, by which the order of a Judge of the Court of Appeal has to be initialed by a Judge of the High Court before being acted upon.

By section 129 (a) power is given to the Court or a Judge to modify and change an order for attachment, and to limit the term of imprisonment, where a person has been committed to gaol for contempt of Court until he shall have purged the contempt; and the order may be made upon such terms as to relief as may seem just. The occasion of this amendment of the law is well known, a recent

case having disclosed that a person having been imprisoned for contempt of Court, and being unable, or stubbornly refusing, to purge his contempt, remains in custody. Under the present amendment, a Judge may limit the term.

By chapter 14 a serious mistake made in a statute of last session was corrected. We pointed out a year ago that two provisions were made in the statutes for issuing execution against lands from the Division Court, which provisions were inconsistent with each other. One is contained in 57 Vict. cap. 23, sec. 8, the other in 57 Vict. cap. 26, sec. 3. The latter is now repealed and the former remains, under which, where a judgment exists unsatisfied in a Division Court to the amount of \$40.00, the judgment creditor may issue execution against lands. Another inconsistent provision contained in section 1 of chapter 26 of last year is amended. By that section, any writ of execution, which included writs in the Division Courts, was to comprehend lands as well as goods, although the Acts allowing executions against lands to be issued out of the Division Courts permitted them to be issued only after a return of *nulla bona* on a writ against goods. The Act is now amended by requiring every writ to comprehend lands as well as goods except Division Court writs.

By chapter 21, an entirely new departure is made in the distribution of the estates of intestates. Under this Act, where a person dies intestate after the 1st of July, 1895, leaving a widow but no issue, where the net value of the estate does not exceed \$1,000, it shall belong absolutely to his widow. To pursue our fault-finding, we think it would have been better drafting to have declared that the proceeds of the estate should be paid to the widow absolutely for her own use in the course of distribution. To declare that the property shall belong absolutely to the widow raises a question as to whether the administrator has any property in the estate at all. By the third section, where the net value of the estate exceeds \$1,000, the widow is entitled absolutely to \$1,000, and has a charge on the whole estate

for such sum with interest from the death of the intestate at four per cent.; and by the fourth section, it is enacted that this \$1,000 is to be in addition, and without prejudice to her interest or share of the real and personal estate remaining after payment of the \$1,000. Here again is inartificial drafting. If the estate comprehends any realty, the widow is entitled to dower as a first charge thereon before all debts; but the clause in question merely makes the payment of the \$1,000 to be without prejudice to her interest and share remaining after payment of the \$1,000, which leaves it in doubt as to whether the intention was only to give her \$1,000 clear in the first place and a distributive share afterwards. If it occurs in the course of administration that the estate may be depreciated by payment of debts to a sum less than the value of her dower, the widow would do well to elect to take her dower first. Then the question would arise as to whether the net value of the estate is to be calculated as depreciated by the value of her dower or as including the value of her dower. The probability is that dower was not intended to be interfered with, as the law favours dower, and it is not expressly mentioned. It may be, however, that inasmuch as a widow can now elect under The Devolution of Estates Act to take either her dower or a distributive share in the estate, this Act will be applicable only after such election. The ground for this interpretation is as follows:—no widow has any interest or share in realty except dower. Dower can be claimed before debts are paid. The \$1,000 given under this Act is to be taken out of the estate after payment of debts, and is to be taken in advance of her share in the realty. Now, her share in the realty arises only where she has elected to take it instead of dower; consequently, the Act will apply only where she has elected to take a distributive share in the realty instead of dower. All this doubt might have been avoided by a simple enactment that in the course of distribution the administrator should pay to the widow for her own use absolutely \$1,000, and distribute the remainder, if any, in the ordinary course of distribution.

Chapter 22 amends the Registry Act. Section 1 enacts that where an instrument is written in any foreign language it shall be necessary to produce to the registrar a sworn translation into English, in addition to the other provisions, on producing the document for registration. A deed is good in any language; consequently registrars have hitherto been obliged to accept deeds for registration although they may not have been written in English. In some parts of the Province, Notarial Acts in the French language appear on the register, and some confusion has arisen in consequence, although there can be no doubt as to the legality both of the documents and the registration. Sections 2 and 3 provide that where mortgages and discharges are not copied in full, the same entries shall be made in the index as if they were, except that "mortgage not copied in full" is to be entered in the registry book opposite the number, when the mortgage is not in fact copied; and the discharge is to have the same effect as if registered in full. The next section provides that a person entitled to receive mortgage money must register the chain of title to himself, which was law before the Act; and section 5 provides a summary proceeding to compel such registration if he declines. By section 8, serious doubt as to the validity of the so-called registration of indexed mortgages is removed. By chapter 35 of the Acts of last session, provision was made for the indexing of a mortgage without transcribing it; and inasmuch as it has been decided that registration consists of transcription in the books, we pointed out that, although the mortgage might be indexed under this Act, it was a question as to whether it was registered, and whether the mortgagee could claim priority by his indexing instead of registration in full. (*Ante*, volume 14, page 216). The clause under review now provides that there shall be no doubt of the effect of the prior Act, but that the indexing shall be as effective as if the mortgage had been entered at full length.

Chapter 23 makes an important change in the law respecting insolvents. Heretofore, where a fraudulent

grantee has disposed of the property, the assignee for creditors has had the sole right to bring an action to recover the proceeds of the sale from such grantee. This action is of course purely artificial and depends solely upon the statutory authority given. The Act in review enlarges the remedy and provides a new, or rather a novel, one in addition. By the first section, in case of a gift which "in law is invalid against creditors," if the donee disposes of it, the money or other proceeds realized therefor by such donee may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or the donee; "and such right to seize and recover shall belong, not only to an assignee, . . . but shall exist in favour of all creditors of such debtor in case there is no such assignment." Why the original Act was not amended in a simple manner is not quite clear; but what is quite clear, is that it is only where there is no assignment that the right of action belongs to creditors as such. If an assignment should be made pending such an action, would the cause of action cease or would it shift into the assignee? The question is an important one; for the right given by this Act is to recover the proceeds for all the creditors; whereas, if the assignee declines to bring an action under the principal Act, a creditor doing so takes all the benefit as well as all the risk. It will be noticed that the right of action by this Act given is not in favour of all who come in and contribute to the costs, as was the Equity practice, but all creditors; and we apprehend that, unless the Court feels that it has inherent power under its discretionary powers as to costs to make their sharing conditional upon contributing to costs, the non-contributing creditors have a distinct advantage.

Following the general enactment as to the cause of action, the next section gives the novel and extraordinary remedy which we have referred to. Where the proceeds are of an exigible character "they may be seized under the execution of any creditor issued against the debtor" and

distributed under the Creditors' Relief Act. No restriction is placed upon the character, or rank, or right of the creditor entitled to sue or seize. Presumably any creditor at the time may seize, although he might not have been a creditor at the time of the disposition of the property. But, apart from this, the remedy given, even if it had been carefully restricted, is too drastic. It is well to discourage such transactions; it is well to facilitate the course of justice; but is it well to put such an instrument into the hands of an exasperated creditor? No previous enquiry of any kind that the perhaps innocent grantee is to share in—but a simple seizure and sale of property in his possession under the execution against another person. This is a convenient way of throwing the onus on him to prove that the transaction was not dishonest, but perfectly honest. Then, how far is the word "proceeds" to reach? If the donee sells the "proceeds," can the purchase money be reached? Or is the innocent purchaser from him to be told that the property in his vendor's hands was subject to an execution against the original debtor, whom he does not know and never heard of, and that he bought property subject to execution and must pay it off?

Following this again, there is a third enactment. Section 3 gives any creditor, whether an execution creditor or not, and whether the proceeds are exigible or not, an action on behalf of himself and all other creditors to recover the proceeds for the general benefit of creditors. Not only is he given an action, but "such other proceedings may be taken as may be necessary to render the said proceeds available." What are these proceedings? Interpleader proceedings might be taken under the prior section which made the proceeds exigible. They are probably excluded. The only other proceedings are examination as a judgment debtor. *Sed quære.*

Now, as far as we have gone, these enactments are confined to cases in which the disposition by the debtor is invalid. We are therefore surprised to learn from the fourth section that "the preceding section shall not apply

as against innocent purchasers of the property." No one supposed that an innocent purchaser would be affected by an enactment which postulated fraudulent or illegal disposition only. In this view the section was unnecessary. But, if necessary, why enact that the preceding section (i.e., section 3, giving a right of action) should not apply to an innocent purchaser, when the purchaser is not saved from section 2, which gives a much more drastic remedy? Then again, is a purchaser innocent who in good faith takes a security, but is technically within the Act? One can see how a vast amount of expensive litigation will take place before the meaning of this Act can be authoritatively settled.

The following is probably a correct paraphrase of the present statutes on this subject:

I. Where there is an assignment for creditors,

(i) The assignee may bring an action to recover from a fraudulent donee the proceeds of a sale of the property.

(ii) If the assignee declines to bring action, any creditor may, by order of a Judge, at his own risk, in the name of the assignee, bring the action for his own benefit.

II. Where there is no assignment,

(i) All creditors have a right to seize or recover the proceeds.

(ii) Any execution creditor of the debtor may seize the proceeds, if exigible, under such execution, and they become distributable under the Creditors' Relief Act.

(iii) Any creditor of the debtor may

(a) bring an action, on behalf of himself and all other creditors;

(b) take such other proceedings as may be necessary to make the proceeds available for creditors; but not as against innocent purchasers of the property.

Section 5 enacts that when an assignment is made, and whether or not it is expressed to be in pursuance of the Assignments Act, it includes all the property of the

assignor, and the Assignments Act applies to the assignee. Section 6 provides for the examination of the assignor as if he were a judgment debtor, upon the resolution of a majority of the creditors at a meeting duly called. The remedies against the debtor for non-attendance and non-disclosure are not very clearly defined. By section 7 they are the same as in the case of a witness in an action in the High Court, *i.e.*, an action for damages by reason of default to the party injured; arrest on a bench warrant; committal. But by section 10 he may be committed to the common gaol for a term not exceeding twelve months.

By chapter 25 an effort has been made to harmonize the conflicting decisions on dower in mortgaged lands, and also to provide for informally-drawn conveyances. The first section takes away the action of dower where the wife shall hereafter join in a deed purporting to convey the land, or signs a deed by which her husband purports to convey the land, although the deed contains no bar of dower. The next section provides that no action shall be brought where the wife has heretofore joined in or signed any such deed, and goes on rather unnecessarily to provide that this enactment is not to prejudice or affect the rights of third persons claiming under subsequent deeds or mortgages heretofore executed by the wife containing a conveyance or release of her dower. The only case in which we imagine the question would arise would be the case of two mortgages, the first without a bar of dower, the second containing the bar of dower. On the death of the husband, if his estate should be in a position to pay the interest on the first mortgage, then the wife would be entitled to her dower; and also if the mortgagee were to take possession and sell, still the land would be subject to dower; the right of the second mortgagee being affected, not by the claim of the wife, but by the position in which he stands as an encumbrancer. If he redeems, then as against him the dower is barred; but if he does not redeem he gains no benefit whatever. The draughtsman has proceeded as if the subsequent grantee were in fact the assignee of the

dower, whereas the fact is that as far as he is concerned, the wife simply bars, that is to say, cuts herself off from bringing an action of dower or making a claim for it.

By the third section, it is enacted (a) that where mortgaged land is sold under a power, or by legal process, the wife has dower "in any surplus" of the purchase money, (b) to the same extent as she would have been entitled to dower in the land if the same had not been sold, (c) and the amount is to be calculated on the amount realized from the sale, not on the excess of the purchase money over the mortgage money. What we presume the draughtsman intended was that the wife should be entitled to dower in the land not reduced by the mortgage debt, and that the surplus purchase money should be available to pay it as far as it would go. This would have been easily expressed; but a round-about way is taken to express it, if, in fact, that is the intention. In the first place, there is no such thing as dower in personalty, and the excess of the purchase money is personalty. But, as she is expressly declared to have dower in the surplus, we presume that now, in addition to the legal estate of dower in land, there is a share in personal property which is called "dower in the surplus after sale under mortgage." Although it is expressly stated that the dower is in the surplus only, still the Act goes on to say that her dower shall be calculated on the whole amount realized, which is not explanatory, but is in fact contradictory. If she had dower in the surplus only, it would be calculated on the amount of the surplus. But, although the Act says she is to have dower in the surplus, it is evident from the context that she is not to have dower in the surplus, but in the whole land, payable out of the surplus.

Again, to what extent is she to have dower in the surplus? The Act says to the same extent as she would have been entitled to dower in the land, if the land had not been sold. Now if the land had not been sold, she would have had no dower whatever, for the Act respecting Dower expressly enacts that as against the mortgagee she shall

have no claim for dower whatever: R. S. O. cap. 133, sec. 5. We have then the contradictory statements that she has dower in the surplus, which, if there is a surplus, is a substantial sum. Secondly, it is to amount to the same as her dower in the land would be if it had not been sold. This is nothing. Thirdly, it is to be calculated upon the whole value of the land as if there were no mortgage in existence; which gives her dower in the whole value, and not in the surplus. The Act does not apply where the mortgage is for purchase money, and does not affect prior mortgages.

By chapter 26, the supposed effect of the decision in *Argles v. McMath*, by the Court of first instance, is overcome. The Act respecting Short Forms of Leases is, as we have before mentioned, so lamentably defective that it cannot be usefully employed at all. One of the supposed defects was that all fixtures attached to the freehold, whether attached by the tenant or not, passed to the landlord under the words of the form. Upon the hypothesis that the decision in the Court of first instance was correct, the Act has been passed, by which the word "fixtures" in covenant 3 (to repair) is made applicable to the fixtures of the landlord only, and the word "fixtures" in covenant 8 (to yield up the fixtures) is also confined to the fixtures erected or placed thereon by the lessor. Inasmuch as the decision in question was reversed by the Divisional Court, the Act throws some doubt upon the meaning of the original enactment as far as existing leases are concerned. The only inference that one can draw from it is, that the Legislature has interpreted its own legislation to be the contrary of what the Divisional Court has determined; and as the amendment respecting fixtures applies only to leases hereafter executed, the inference is confirmed that the Legislature considers all existing leases as being properly interpreted by the Court of first instance. This is a case in which a retroactive enactment would have been of great benefit. Though the Act does grammatically bear the interpretation which the Court of first instance put upon it, the common opinion was that which has been

decided to be the law by the Divisional Court; and as all existing contracts had been made upon that assumption, it would have been but an act of justice to confirm them. As a matter of fact, the probability is now that more litigation will ensue on existing leases, for the very reason that the Act which makes the cure does not affect existing leases, if in fact they require it.

By the same Act, the lien of the landlord for rent after an assignment for creditors is restricted to the arrears of rent for one year previous to and three months following the assignment, and then so long as the assignee retains possession of the premises leased; but the assignee may elect to retain the premises for the unexpired term.

Section 4 of the same Act is an entirely new departure in property law, and the scope of it it would be hazardous to express an opinion upon. Hitherto, the relation of landlord and tenant has been purely feudal in its nature, resting upon the fact that the tenant holds the land of or from his landlord. The very relationship of landlord and tenant made the tenant the debtor of his landlord for his rent, and upon this relationship the old action of debt on the demise was maintainable. The interest of the tenant was an estate in the land. The section in question now declares that the relation of landlord and tenant shall be deemed to be founded in the express or implied contract of the parties, and not founded upon tenure or service. No reversion shall be necessary to such a relation, and it shall be deemed to subsist in all cases where there is an agreement to hold land from or under another in consideration of rent.

Habits of thought are difficult to get rid of, and it is curious, therefore, to observe that the clause which expressly declares that the relation of landlord and tenant shall not depend on tenure or service expressly makes the relation of landlord subsist only where the tenant holds *from or under another*, which is about as exact a definition of the feudal relation as it is possible to devise. However, we cannot infer from the use of this expression that

there is a tenure in the feudal sense between a tenant and his landlord, inasmuch as the clause specifically denies it. The question immediately arises upon this clause, has the tenant any interest in the land? Has he got anything which he can mortgage, assign or surrender? Can he sub-let? Presumably he may assign the whole right which he has to hold and reserve rent, which is not rent, but money payable on a contract, and yet call himself a landlord because no reversion is necessary to this relationship. Is the prohibition against assigning without leave any good? All choses in action arising out of contract are by law assignable, and the tenant conveys nothing by his assignment. Is the right of distress gone? The right of distress is incident to the reversion, but no tenure exists now between the parties as between reversioner and tenant. It is a case simply of contract, and as the rent is not due on the demise, but on the contract expressed or implied, and there is no law to entitle the promisee to distrain for money due upon a contract, we should imagine that the right of distress was completely gone. Again, has the tenant anything which may be sold under execution? Formerly, writs against goods bound a term of years. Now, there is nothing but an obligation to pay rent, with liberty to use the land. Apparently this cannot be sold. In fact, such a host of questions arise all at once that it is impossible to treat even superficially of such a sweeping change within reasonable limits. One can hardly see the policy of making sweeping changes in the law respecting property, which tend not to facilitate transactions between man and man, but to render them so uncertain that the person having the property surrounds himself with every imaginable device by which he can secure himself, perhaps to the injury and detriment of the person with whom he is contracting, for the very reason that the law, instead of being simplified, is in fact complicated by the amendment. The law of landlord and tenant has subsisted for so many years, and such amendments have from time to time been made with regard to leases and estates thereunder, that, although it is a com-

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plicated branch of the law, one can always for dealing with almost every phase that it can take. Obliterate all the old law with so much hardly acquired knowledge but Solicitors are all at sea as to what is the new enactment, which must take years of the slow course of judicial interpretation but tell their clients what their rights are with a piece of property.

The remainder of the statutes are of no interest, with the exception of that which allows a woman may be called to the bar, as well as to practise as a solicitor, comment upon which is unnecessary.

EDITORIAL REVIEW.

Temporary Insanity and Suicide.

Perhaps the hot weather, the silly season, will account for a recent verdict of a coroner's jury, that a certain deceased killed himself while temporarily insane. It is an old-fashioned verdict, but is not worthy of revival. It perhaps did not occur to either the coroner or the jury, that if the assertion were made that A. on a certain date became insane and never recovered from it, but died in that condition, his state of mind would not be accurately described as temporary insanity. Unsoundness of mind, from its inception to the patient's death, is anything but temporary; and the suicide of the patient while insane cannot make a difference. However, it is hardly the subject of serious comment, unless it implies the prophetic knowledge in the jury of the certain recovery from insanity of the most interested person if he had not rendered that event impossible by his suicide. Altogether, it would be well for coroners to revise the verdicts of their juries, and point out such absurdities before finally accepting them.

THE CANADIAN LAW

SEPTEMBER, 1895

THE SPECIAL EXAMI

THE recent amendments of the rules of discovery, and the more recent decision in *Beaton v. The Globe*, show a strong opinion has set in against the demand for a more liberal construction of which the spirit of the Judicature Act is evoked. Rules of evidence which exclude examinations for discovery at any rate are discredited as that terrible bogey "a rule which requires questions to be confined to matters in issue," and as for objecting to questions on the ground that this is a wanton resurrection of the bogey of the "rule of exclusion," it is not too much to say that a refusal to comply with the rules should be regarded in an examiner's office as an attempt to conceal. Added to this, practitioners have an unwritten rule that no question put should be taken "subject to the objections of the objectors," by reason of their very limited power, they are compelled to acquiesce.

In this laxity of practice and laxity of examiners, coupled with other reasons, again have occasion to advert, is to be the abuse of the practice for discovery. The rules are intended to remedy. Folio after folio is inserted in almost every brief, which lengthen the examiner's bill.

If we take it as admitted that discovery is in most cases beneficial, it is not the number of examinations held, but the undue length of the evidence that is the abuse, and this can only be effectually checked by giving the examiners increased control and power to rule on the admissibility of evidence and by freeing them from the cramping influence of patronage.

Whilst the facilities for obtaining discovery in this Province have greatly increased of late years, the powers given to the special examiners are those which were possessed some forty years ago by officials who discharged different duties for a different purpose. With the general introduction of shorthand the climax has been reached, and the old machinery has given way under the strain; the amending rules seek to relieve the strain but not to provide improved machinery.

By section 147 of the Judicature Act, the Supreme Court is authorized to appoint special examiners, "and the examiners so appointed shall have all the powers formerly possessed by Masters Extraordinary and Examiners." These officials discharged well-defined duties with very limited powers. The former were commissioners for taking affidavits (not depositions) when sworn at any place in England outside of a twenty-mile zone from Lincoln's Inn. The examiners were two officers attached to the Court of Chancery, originally the deputies of the Master of the Rolls, who took the depositions of witnesses in London for use at the hearing. The examination took place on written interrogatories which were unknown to the opposite party and in the strictest privacy, no one being present but the examiner and the witness, and the concealment of these depositions until "publication day" was guarded with elaborate precautions. When it is remembered that at this time no oral evidence was taken at the hearing, the reason for this care will be evident, as well as for the fact that the examiner could have no power to rule upon the admissibility of evidence; his duties were purely ministerial, and consisted of reading

tion, but after publication. In this way the examiners, after enjoying for a short time semi-judicial functions, were reduced to the level of their English brethren—machines for recording evidence.

Thus the practice continued until 1850, when the Court was remodelled under the Chancery Act. By the general orders passed immediately after this Act, the parties to the record became liable to examination as other witnesses by the party adverse in interest.

In Toronto, the examination of all witnesses took place before one of the Judges, in the outer counties, before one of the examiners of the county town of the county in which the witness resided. In these orders, the policy of the original Act (7 Wm. IV. c. 2), is again adopted, and interrogatories, except by direction of the Court, are abolished, the examination being *viva voce* and conducted by the parties, their counsel or solicitors; but, to guard against the dangers arising from the incompetence of the country examiners, it was provided that a witness might be recalled after publication on special order. For it must be remembered that these examinations were still held for the purpose only of taking evidence for use at the hearing where oral evidence was as yet unheard.

No alteration was made in the practice until 1853, when a change occurred which relieved the masters extraordinary of their duties as examiners, it being enacted that all witnesses should thereafter be examined either before the Court or before a deputy master in the country, and the cross-examination of deponents on their affidavits, which was then for the first time introduced, was assigned to a Judge, deputy master, or examiner specially appointed for the purpose.

Thus were the masters extraordinary deprived of their most important duties, and silently disappear as examiners: they received their *coup de grace* in 1857, when their loud-resounding title was taken from them and their remaining duties transferred to "commissioners for taking affidavits in Chancery."

In 1857, the depositions of witnesses ceased to be taken by deputy, and were thereafter required to be taken before a Judge on circuit, and examination terms were fixed at different places for the purpose; and in 1863 the final step in the evolution of the modern trial was taken when it was enacted that causes should be argued at the same time that witnesses were examined. Notwithstanding this change, the old order for the examination of a party adverse in interest was held still to be in force, and out of this practice grew the present examination for discovery.

At the time, therefore, to which we are referred by the Judicature Act to ascertain the powers of special examiners, the modern examination for discovery was unknown; all evidence taken by the masters extraordinary and examiners was that of witnesses in the country for use at the hearing, and all other examinations of deponents were assigned to other officers. That the discretionary powers of examiners who took the evidence on which the cause was to be heard should be strictly limited seems natural enough, especially when those officers, as the Reports show, were incompetent, and would no doubt feel themselves confined to the strict ministerial functions of their English namesakes, if they knew them; but why examiners for taking depositions in examinations for discovery, which can only be used at the trial to a limited extent, and are therefore subject to be contradicted, should be restricted in the same way, is not so clear. The anomaly, which could hardly be more complete, seems to have arisen from a mistaken idea that the special examiners were the successors of the masters extraordinary and examiners, which they were not.

But it may be said that as the section of the Judicature Act which defines the powers of special examiners did not appear until the recent revision, these officers must be held to have possessed, and still to possess, inherent powers sufficient for the due discharge of the duties entrusted to them. The origin of their appointment, however, does not

seem to justify a claim for discretionary powers of a high order. There being no statute or general order creating them, their existence seems to depend on a quiet usurpation of the Chancery Judges, effected under the orders of 1853 and 1857. The first appointment of a Special Examiner as a permanent officer recorded at the Hall was made in 1860.

From 1853 to 1857 the examination of witnesses (including parties adverse in interest) took place in Toronto before a Judge, in the outer counties either before a Judge or deputy master; during the same period the cross-examination of deponents on their affidavits might be taken either before a Judge, deputy master, or person specially appointed for the purpose.

From 1857 to 1863 the cross-examination of deponents continued to be taken as before, but all witnesses were examined before a Judge; and when, in 1863, the examination of witnesses and the hearing took place at the same time, the examination of parties (there being no other provision made) necessarily fell as before to the Judges, and would be naturally assigned by them to their deputies, the special examiners. But as a Judge can only depute his ministerial duties, the examiner, therefore, had no judicial discretion to rule on evidence; and if a question was raised he referred the decision to the Judge who in theory was present during the examination. It would therefore appear that whether we look for the powers of the special examiners to the powers formerly possessed by masters extraordinary and examiners, or to their inherent powers as deputies of the Judges, they have no discretion to rule on the admissibility of evidence. The result is that they are, particularly since the general introduction of shorthand, ciphers in their own offices. And as a consequent result of this, the examinations which take place before them are protracted to undue length, occasioning thereby the expense against which the recent outcry has been raised.

The remedy which I submit is based on the assumption that the profession is too much enamoured of the system of an oral examination taken in shorthand to brook any suggestion of an adoption of the more precise and more scientific practice prescribed in England. Taking this as granted, the whole enquiry seems to be, how shall we minimize the abuses to which our system is open? As a general classification, the causes of the abuse may be grouped under two heads—those which arise from the system itself and those due to the manner in which the system is carried out. Let us take the second head first.

The system is abused in four ways :

(1) By examining counsel exceeding the limits of proper discovery.

(2) By cross-examining counsel going into unnecessary matters and at undue length.

(3) By want of careful preparation by counsel.

(4) By giving uncontrolled liberty to the witness.

The evil effects of all these causes of abuse might be greatly mitigated by giving the examiners increased powers. Let the examiner have power, *sua sponte*, if necessary, to exclude improper questions, particularly in holding cross-examining counsel to matters of explanation only, and the length of the evidence will often be materially shortened.

It may be said that such a practice might lead to the exclusion of proper evidence; but in answer to this we may regard it as certain that the leaning in cases of doubt will be to admit, not to exclude; and in any event the risk of occasional exclusion of testimony which is not irremediable, as it was under the old practice, will be more than compensated by the reduction in the general expense and the increased precision and care with which examinations would come to be conducted if held in hand by the presiding officer. This brings us to the third cause.

The introduction of shorthand and the consequent great reduction in the time spent in going over even extensive ground, coupled with the absence of any need for precision resulting from the oral system, has occasioned much carelessness in the matter of preparation, with the result that examinations are often vague and rambling. I do not think that the examiner should endeavour to interfere to mitigate this evil, even if he had the power; but the result of giving him increased control will have the effect of causing the profession to exercise greater care in this respect.

The fourth cause is one of great importance. In most cases it may be safely said that the undue length of the evidence is due to the witness. There is no need to give a witness under examination for discovery the same license as a witness at the trial. He is not under cross-examination and his demeanour is of no consequence. He might therefore be constantly checked without inconvenience. But neither counsel is greatly concerned to do this; the examining counsel wants to hear all the witness will tell him, and his own solicitor seldom interferes, as he has "nothing to conceal." This duty therefore devolves on the examiner; but he is powerless. As regards the other head which I have mentioned, abuses arising from the system itself—little, if anything, can be done by the examiner during the continuance of the examination. It is quite impossible to conduct an oral examination, especially when reported in shorthand, with the precision and conciseness of an examination on interrogatories. Dozens of questions are put and answered without objection at every trial which it would be difficult to justify on strict rules of evidence; besides this, some witnesses, even with the best intentions, seem incapable of arranging their ideas in order, and in consequence answer so evasively as to require several questions to elicit a definite answer where one should suffice.

To cure this result, I submit my final proposal for reduction of the length of the evidence: instead of

requiring the examiner to return the evidence verbatim, let him, in extending it, omit all unnecessary questions and all answers which are completely irrelevant, argumentative or generally useless. This should not, of course, be done during the examination. Everything should be taken down as at present, in case of subsequent need on a dispute arising, and the power should in any case be sparingly exercised, and only when the portion omitted is clearly useless.

But there is another difficulty to be overcome, if the examiners are to be given increased powers; they must be released from the fee system and paid by salary. It is wrong that an officer whose duties are in any sense judicial should be dependent on the good-will of his patrons. Whether he is liable to be influenced or not, it is unfair to put him in such a position; and no matter how conscientious he may be, his rulings will often displease persons who will attribute his decisions to partiality, and so bring discredit on the system. As a corollary to this provision, it would also be well that the fees paid should be based, not, as at present, on the length of the evidence, but at so much per hour on the value of the services rendered; in other words, it is the examiner who should be paid, not the shorthand writer.

To carry out the practical working of these suggestions, there would need to be appointed an examiner for each division of the High Court, and such a number of assistant examiners as the work would require.

The examiners would be at their offices during certain hours every day to take all examinations in their respective divisions; and if from pressure of other appointments during these hours an examiner should be unable to act, he would pass the appointment on to one of the assistant examiners.

Fees should be paid in stamps on delivery of the evidence; and as it sometimes happens that the examiners' fees remain unpaid when the evidence is not needed, they

should be required to make a quarterly return of all unpaid fees to some officer whose duty it would be to collect them.

The writer is quite conscious that one of the suggestions which he has made would be very difficult in practice, and possibly prove impracticable, that of allowing an examiner to eliminate questions and answers; but he is equally confident that good would in many cases result, if such power were exercised with discretion; and, in any case, an effective power, not merely to exclude improper questions, but to reduce the length of the evidence, is so real a need as to justify a strong effort to attain the desired end.

W. D. GWYNNE

TRUSTS FOR LEGISLATION.

A trust to procure legislation to render valid an invalid trust is a rarity, but we are not without some striking examples of it. The object of a devise or bequest may be non-existent, or, being existent, may not have capacity to take; but a will may be so framed that the trusts will be declared valid, if provision is made in the will for the calling into existence of the non-existent object or the issue of a license to enable the object to take.

In Porter's case (a) the testator devised lands to his wife and her heirs as follows: "I will and declare by this, my last will and testament, that the said gift of my lands and tenements shall enure and take effect to my said wife upon condition following: that is to say, that my said wife, upon advice of learned counsel, in all convenient speed after my decease, shall assure, give and grant all my said lands and tenements for the maintenance and continuance of the said free school, alms-men and alms-women forever, as it shall please God." The devise was held to be good for reasons of which the following is one: "And the second reason that the Queen's counsel gave was, admitting that good and charitable uses were made void by the said Act of 23 H. 8, yet the condition is not void, as our case is, for he hath devised that his wife shall have his lands and tenements upon condition that she, by the advice of learned counsel, in convenient time after his death, shall assure all his lands and tenements for the maintenance and continuance of the said free school and alms-men and alms-women forever; so that, although the said uses were prohibited by the said Act, yet the testator hath devised that counsel learned should advise how the said lands and

(a) 1 Co. 22 b.

tenements should be assured for the maintenance and continuance, etc., and that may be advised lawfully, viz., first to make a corporation of them by the King's letters patent, and afterwards by license to assure the lands and tenements to them." And it was held accordingly that the wife was bound to perform the trust.

A celebrated case is *Attorney-General ex rel. Univ. of Cambridge v. Lady Downing* (b).

The trust of the will there discussed was that the trustees should purchase the fee simple of some piece of land in the Town of Cambridge for the purpose of erecting a college and other buildings necessary thereto to be called Downing College, and the will then proceeded as follows: "A charter royal to be sued for and obtained for the founding of the said college, of obtaining a body collegiate by that name in and within the University of Cambridge, etc., etc., and immediately from and after founding and incorporating such collegiate body, etc., the said trustees shall stand and be seised of all and singular the said lands, etc., in trust for the said collegiate and their successors forever." Upon an information filed, the Lord Chancellor was assisted by the Master of the Rolls and Lord Chief Justice Wilmot, the opinion of the latter being reported in the place referred to. After discussing the law of mortmain, and charitable and superstitious uses, the Chief Justice, at page 15, proceeds to consider how the law stands as to devising estates to persons not in esse, either in possession or remainder. He then points out that an executory trust stands in a different position from an ordinary devise to a non-existent person, because the vacuum is avoided by the devise to the trustees. He then proceeds as follows: "So in this case the testator does not only declare his intention to give to a person not in esse, but is actually giving directions for the incorporation of that person, and there is no difference between the cases but that one is an executory trust for a natural person to be created and the other is for a political person

(b) Wilm. Opin. 1.

to be created." He then, with dry humour, notices the objection that it depended entirely on the grace of the Crown whether such a college should ever exist or not, and remarks that it equally depends upon the will of God whether A. B. shall or shall not have a son; but a devise to the first son which A. B. shall have is good, although the event may wait a whole lifetime, while the will of a King may be known in six months; so that the contingency is greatly within the time within which the executory trust should arise. Finding nothing illegal in the incorporation of such society, he then discusses the question whether the trust is one under all the circumstances which a Court of Equity ought to aid, and after reviewing many authorities, he holds that it is one which the Court ought to enforce, and the ultimate result was that a decree was made declaring that the trust ought to be carried into execution in case His Majesty should grant the royal charter to incorporate the college, and issue his license for such incorporated college to take the devised premises in mortmain.

It is worthy of observation that a double contingency is here provided for: 1. The incorporation of the college; 2. The license to hold lands in mortmain.

Some thirty years after this decree was made, the matter again arose in *Attorney-General v. Bowyer* (c), where the circumstances are again related in the report. The question that arose there was whether or not the heir-at-law was entitled to the intermediate rents and profits until the college was incorporated: and although it appears by this report that five separate attempts to obtain a charter had been defeated, the heir-at-law was still held not entitled to the lands, as the trust was valid and explicit. This case may be referred to for two purposes: first, to show that the trust was protected by the Court, notwithstanding the repeated disappointments of the trustees in attempting to get a charter; secondly, because at page 727 the Lord Chancellor used this expres-

(c) 3 Ves. 714.

sion, "part of the trust which the Court hath declared good is to obtain a charter and license." Another very important dictum is the following: "The case would have been exactly the same supposing the devise had been to an existing college, but which had exhausted its license to hold in mortmain; for until that license had been instituted on the part of the Crown, the college having no power to hold in mortmain could not have taken any legal interest in the land." The case is further reported in Ambler's reports at page 550. It is, worthy of note also that notwithstanding the five separate refusals of the Crown to grant a charter, the Court referred it to the Master to propound a scheme for the college pursuant to the devise.

We deduce from this case, (1) that a devise to a non-existent object may be declared valid if provision is made in the will for bringing into existence the artificial person with a capacity to take the devise; (2) that there is no difference between such a devise and an executory devise to a natural person to be born; (3) that a devise to a corporation incapable of taking, or to a capable one whose license of mortmain is exhausted, may be good, if provision is made for procuring the necessary license to take; (4) that the direction to create the artificial person, or to procure the license, is part of the trust, and the devisee is bound to perform it. And, of course, if this is to be done by legislation it is bound to be sought; and one failure or more will not relieve the trustee from the obligation to continue his exertions.

The leading case in the United States appears to be *Inglis v. The Trustees of the Sailor's Snug Harbour* (d). There was a devise of all the residue, real and personal, of the testator to the Chancellor of the State of New York, the Mayor and Recorder of the City of New York, and several other persons, named by their official description, to hold to them and their respective successors in office to the uses and trusts declared in the will. The trusts in

(d) 8 Peters, 99.

question were to erect upon the land upon which he resided a hospital or asylum to be called "The Sailor's Snug Harbour," for the purpose of maintaining and supporting aged, decrepid and worn-out sailors. The testator added, "It is my will and desire that if it cannot legally be done according to my above intention by them, without an Act of the Legislature, it is my will and desire that they will, as soon as possible, apply for an Act of the Legislature to incorporate them for the purposes above specified. And I do further declare it to be my will and intention that the said rest, residue and remainder of my real and personal estate should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this, my said will, as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations or any other persons should heir, possess or enjoy my property, except in the manner and for the uses herein above specified." There was no devise over in case this failed. Five years after the testator's death, the trustees procured an Act of the Legislature of New York to be passed constituting the persons holding the offices designated in the will a body corporate; and it was held by the Supreme Court of the United States that it was a good devise to divest the heir of his legal estate, or at all events to affect the lands in his hands with the trust declared in the will. It was said by the Supreme Court of the United States that if a technical objection were interposed it would infringe upon the cardinal rule that the intention of the testator is to be carried out. "But no such difficulty, in my judgment, is here presented. If the intention of the testator cannot be carried into effect precisely in the mode at first contemplated by him, consistently with the rules of law, he has provided an alternative, which, with the aid of the Act of the Legislature, must remove all difficulty." And at another place, following out this idea, it is said, "And the devise would then be to a corporation to be created by the Legislature, composed of the several officers

designated in the will as trustees, to take the estate and execute the trust. And what objection can there be to this as a valid executory devise, which is such a disposition of lands that thereby no estate vests at the death of the devisor, but only on some future contingency?" And the contingency of the creation of a corporation was said not to be too remote. This case is distinguished in the judgment from cases in which the beneficiaries are uncertain, as the Baptist Association v. Hart's Executors (e), where the devise was "to the Baptist Association that for ordinary meets at Philadelphia." If the devise had been to the Baptist Association to be incorporated, the object would have been certain and the devise good. And it is pointed out that if the trust is clearly declared by the will, the Legislature can, notwithstanding the constitutional limitations, *ex post facto*, give capacity to the proposed body to take the gift, and that it is not in derogation of the rights of the heir-at-law. This is an important point in the case, because, if the land descended to the heir freed from the trust, he could not constitutionally be deprived of it without compensation. But the Court held that if he did take, he held the land impressed with the trust, and would not be deprived of his property by being compelled to execute it.

The next case is Burrill v. Boardman (f). In that case there was a devise and bequest to certain incorporations and private individuals for the establishment of a hospital. Then followed a direction to apply to the Legislature to incorporate and perpetuate the hospital, and it was further provided that if the Legislature for two years should refuse or neglect to grant a charter, the trustees were to pay the money to the United States of America. The Chief Judge of the Court of Appeals pointed out that the trustees could only accomplish their duties by applying for a charter of incorporation, and it was their duty promptly to so apply. Upon the further question as to whether an

(e) 4 Wheat. 27.

(f) 43 N. Y. 254.

executory bequest to a corporation to be created was valid, the learned Judge proceeded upon the authority of the *Attorney-General v. Downing*, and *Inglis v. Sailor's Snug Harbour*, and said he was unable to discover any valid objection to such a bequest. This case arose after an Act of incorporation had been passed, as desired by the testator.

Tilden v. Green may now be referred to (g). This case was brought to test the validity of a devise by Mr. Tilden of New York for the establishment of a free library and reading room in the city of New York, and for other purposes. He directed his trustees to hold the property and to procure the incorporation of an institution, with capacity to establish and maintain a free library and reading room in the city of New York, and to promote such scientific and educational purposes as they should designate. Then followed a provision, that, if for any cause or reason the trustees should deem it inexpedient to so convey or apply the residue, they were authorized to apply or hold such portion as was not so applied to such charitable educational purposes as in their judgment would render it most widely beneficial to mankind. The Court of Appeals in the State of New York held that a valid devise or bequest might be made to a corporation to be created after the death of a testator and recognized the cases already cited. But on account of the discretion of the trustees to use their own judgment as to whether they would devote the funds to the object of the free library or to some other purpose beneficial to mankind, it was said that the trust was invalid because of the indefiniteness and uncertainty of its objects and purposes, and that, although the executors had in the meantime procured an incorporation for the purposes of the library and had conveyed the residuary estate to it. In this case three Judges dissented, but the principle was recognized which has been laid down in the other cases. The ultimate result of *Tilden's* case was that one of the next of kin made a gift of a very large

(g) 130 N. Y. 29.

sum of money to the object named in the will, and so the litigation ended.

The cases cited proceed upon the principle that if the trust is clear and definite, and there is a direction to proceed and have it validated, then the incapacity to take does not prevent the devise from being good, inasmuch as it is part of the trust to procure the necessary confirmation.

There is also a class of cases to be found in the American books which depend to some extent on the prohibition of the constitutional limitations. For instance, where lands are devised to a non-existent corporation, it has been held that the heir takes, and that a subsequent Act of the Legislature creating the corporation will not divest him of his title, inasmuch as his property can not be taken from him without due compensation being made. This emphasizes the distinction made in the case in which the trust is created, and it is part of the trust that there is a duty cast upon the executors or proposed trustees to procure the incorporation for the purposes of the will. The existence of the constitutional limitations referred to also emphasizes the strength of the decisions above cited, inasmuch as that is done in an indirect manner and under cover of a trust, which the constitutional limitations of the different States forbid to be done directly.

EDITORIAL REVIEW.

Precatory Trusts.

We dealt with this subject at some length in volume X. at p. 145, there reviewing the modern cases which showed a complete departure from those of greater age. The subject has again loomed up in *Re Hamilton*, French v. Hamilton, 12 R. Aug. 49, and the trend of modern cases is adhered to by the Court of Appeal in England.

In this case the bequest was as follows: "I give, bequeath and appoint to my dear nieces, Mrs. Gascoigne and Lady Ashtown, the sum of £2,000 apiece for their sole and separate uses and to be independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew, Silver Oliver, and my dear niece, Mrs. Pakenham, in such mode as they shall consider right." The Court held, affirming the judgment of Kekewich, J., that the will did not create a precatory trust. Lord Justice Lindley treated the words as follows: "I give £2,000 to Lady Ashtown; but I express my wish that, subject to any reason she may see to the contrary, she should leave it to these families." There was no specific trust declared anywhere in the will, the whole document being "a mere string of pecuniary bequests." The decision in *Re Adams & Kensington Vestry*, 27 Ch. D. 406, was followed, where it was said that the old decisions had gone too far, and his Lordship made this significant remark: "We are bound to see that beneficiaries are not made trustees unless intended to be made so by their testator."

Lord Justice Lopes said of the testatrix, "She intended to give her the £2,000 absolutely, trusting to her affection

and honour to follow the wish which is expressed, if she found it desirable so to do when the occasion required, but not intending in any way to fetter or bind her with regard to the disposition of the property."

The natural remark to make regarding bequests of this character is, that if the testator really intends and desires that the legacy shall be enjoyed by the legatee for life only, and that thereafter it shall pass by the original will to another, the legatee being merely the appointor, then a trust is created; but if the testator does not direct the course of the legacy after the death of the legatee, but leaves it to the legatee to dispose of it by his will, then no trust can be created, for the legatee is not merely the appointor, but is in turn a testator who is merely requested or exhorted or desired to bequeath in a particular way, but is at liberty as a testator to do what he will with his own.

The present case furnishes, perhaps, the clearest illustration of a testator's relying, not on his own will to direct the course of the legacy, but on the affection or feeling of honour which his legatee may have towards him as an inducement to carry out what he himself did not choose to insist upon. Being of opinion that this feeling is strong enough to influence his legatee, he does not impose an obligation on him. He knows or believes that there is no necessity to create an obligation.

It is true that no general rule can be laid down in such a case. The old cases treated the wish entirely as an obligation. But in the case in question all the Judges refused to be bound by ancient decisions, looking to the actual signification of the words used only, and declined to create a trust where no trust was in fact commanded or specifically created.

Dominion Queen's Counsel.

His Excellency the Governor-General has been pleased to appoint the Honourable Clifford Sifton, Attorney-Gen-

eral of Manitoba, and J. J. Kingsmill, Esquire, late a County Judge in Ontario, to be Queen's Counsel.

Careless Legislation.

A correspondent gives an example at another page of the careless drafting of an amendment to the Municipal Act last session.

We might add a still further example. By 55 Vict. cap. 48, sec. 27, provision is made for assessing vacant land in cities, towns and villages as if it were held for farming or gardening purposes. The words are, "in cities, and where the extent of such ground exceeds ten acres, in towns and incorporated villages." By some extraordinary process of amendment, the secret of which is not disclosed, in 58 Vict. cap. 47, sec. 2, this is altered to read as follows: "Where the extent of such ground exceeds two acres in cities, and ten acres in cities, towns and incorporated villages."

BOOK REVIEWS.

Probate, Administration and Guardianship, Common Form and Contentious Business, with Statutes and Rules, including certain High Court of Justice Rules governing the Surrogate Courts of Ontario; also Forms and Table of Fees. By ALFRED HOWELL, of Osgoode Hall, Barrister-at-Law, author of "Admiralty Practice," etc., etc. Second edition. Toronto: The Carswell Co. 1895.

This well-known work on a most important branch of practice has just been issued in an improved style as a second edition, the first edition having been exhausted. During the fifteen years which have elapsed since the first edition the volume of business transacted in the Courts referred to has, with the increase of population and wealth in the country, greatly increased; and many changes have been made in the law and rules of Court.

A number of enactments have been made by the Legislature of Ontario, the most recent in April, 1895, directly or indirectly affecting the law or practice of the Surrogate Courts, which have been set forth or referred to in the present treatise, namely: The Devolution of Estates Act, and amendments thereto, and the Act of 1890,—“An Act to amend the Surrogate Courts Act,” striking out the word “goods,” the words “personal estate,” and words of like import, and substituting the word “property,” and directing that the Surrogate Courts Act should be taken as amended so as to conform to the intent and meaning of the Devolution of Estates Act; and in effect, as has been held, abolishing the distinction between real and personal estate for the purposes of administration; also The Succession Duty Act; the Act respecting Ancillary Grants of Probate and Administration, with recent orders in Council giving effect to the same, with certain other statutes passed at the last session of the Legislature; all of which have made material changes in the law affecting Surrogate Courts. The Statutes of Distribution having been modi-

fied by the Devolution of Estates Act, and important judicial decisions thereon having already been reported, such decisions have also been noted in this work as well as the statutes themselves.

A considerable part of the volume is occupied with Probate Law generally, as administered in England, and in Ontario and other Provinces which follow the English system; and with the Practice of Courts of Probate, using that expression with reference to the general signification attached to it by the interpretation clause of the Colonial Probates Act, 1892. The leading cases in England, as well as in Canada, in which the validity of wills has been contested on the ground of the testator's incapacity, have been introduced and cited; all phases of such incapacity being dealt with; the auditing of accounts, guardianship of infants, are dealt with, and tables of costs and forms are added. It is a work that every practitioner should have.

A Hand-book of Procedure under the Ditches and Watercourses Act, 1894, and amendments thereto. By GEORGE FREDERICK HENDERSON, of Osgoode Hall, Barrister-at-Law. Toronto: The Carswell Co. 1895.

This is a homely but necessary branch of law, and involves in some cases very intricate questions. Mr. Henderson, having given special attention to the subject, has produced a manual which contains notes of all the decided cases on the subject, and will be of use to any one having occasion to consult it.

Outlines of Trial Procedure. By J. L. BENNETT, of the Chicago Bar. Chicago: Donohue & Henneberry. 1895.

This is a handy little book, but the trial procedure is so different from our own that it cannot be of great service. In many points the results of experience are set down, but we doubt if the book can take the place of actual experience.

CORRESPONDENCE.

Careless Legislation.

To the Editor of THE CANADIAN LAW TIMES :

SIR,—You will find another example of careless draughtsmanship in 58 Vict. cap. 42, sec. 10, whose object is to alter the date fixed by sec. 182 of the Municipal Act, after which a vacancy in the Council need not be filled, from the first day of December to the first day of November. Instead of simply substituting the word "November" for "December," which was the intention, the amending section strikes out the words "the first day of December" and substitutes "first day of November." There may be some occult reason for eliminating the definite article, but the only apparent result is a specimen of slovenly composition.

Yours, etc.,

PETER D. CRERAR.

THE CANADIAN LAW TIMES.

OCTOBER, 1895.

THE NEW LANDLORD AND TENANT.

IN reviewing the legislation of Ontario for the year, we made some remarks, embodying hastily formed ideas, as to the effect of the enactment changing the relation of landlord and tenant from status to contract. We have to confess our ignorance at the time of the source of the enactment, but further enquiry having resulted in the discovery of its origin, we propose to present to a long-suffering profession such material as a search in a limited area has disclosed. The hastily formed opinions expressed in our review are not by any means shaken, but on the contrary confirmed, by a perusal of the Act from which the clause in question has been torn, and of two essays on the history of Irish land tenure and legislation affecting them, of which this is part. The clause is taken from an Imperial Act relating to Ireland passed in 1860, viz., 23 & 24 Vict. cap. 154.

It is good sense as well as good law, when attempting to construe a statute, to ascertain the prior law, and the evil to be remedied. If one were to be asked what was the evil to be remedied in the feudal relation of landlord and tenant, and how is it removed by substituting the contractual relationship therefor, it would be exceedingly difficult to point out the evil, and, of course, impossible to assert that the enactment was a remedy. When we ascer-

tain that the clause in question is a clause of an Act of the Imperial Parliament covering many pages of the statute book, that it was passed in 1860, that it affected Ireland only, that it was superseded by another Act in 1870, and that the provisions were found so lamentably defective that statute after statute was passed in order to bring about the result that this was intended but failed to bring about, it is not too much to say that a business man of ordinary common sense would have said, before making it law here, "What are the circumstances of Ontario? Are they in any manner similar to those of Ireland when the Act was passed? If the Act did not accomplish its purpose in Ireland, will it do so here? If not, then let us have none of it."

Before dealing more definitely with the enactment, we propose first to indicate, in a very superficial manner, why it was considered necessary to pass the Act for Ireland, and not for England. The answer to this query is very short. The circumstances in Ireland were not similar in any respect to those in England. The enquiry involves a study of land tenure and economic conditions in both countries, and a very interesting and intelligent account of both may be found in Finlason's History of the Law of Tenures of Land in England and Ireland (*a*). This writer says, at p. 3, "The evils of Ireland, so far as they relate to the tenure of land, have arisen, not from the application of the English law, but because it has *not* been applied and carried out in Ireland." He then shows how tenures in England became hereditary, and how even the most servile tenure grew more by usage than anything else into copyhold tenure. Thus insecure estates became by lapse of time and through natural causes free and certain, and freehold tenure was the result. The villeins, who were the property of the lord, gradually emerged into copyholders, and on their part secured freedom and certainty in their tenures. How was it in Ireland? At p. 9, the author says, "It has been altogether otherwise in Ireland, because

(*a*) London: Stevens & Haynes, 1870.

there never was the same basis of law on which such custom could be built and such traditions could arise; there the disturbing causes have always been without the counteracting causes. Though the English law was *nomi- nally* extended to Ireland at the time of the conquest of the country, it was not really directly carried out except in the small portions really reduced to real subjection, which for centuries were small. In the meantime the Irish system of tenure, which, like our own before the Roman Conquest, was barbarous, gave the tenant no certain interest in the soil he cultivated. The Roman law, with its enlightened wisdom and its spirit of justice and equity, was never implanted there, as in this country, during centuries of Roman rule." He goes on to show how a certain system of Irish tenure, being founded on alleged custom, was held illegal in the reign of James I., as unreasonable and contrary to public policy; and how, notwithstanding this, the English custom and law failed to take root on account of the hostility between landlords and tenants and to well-known historical causes. Ulster was the exception, and in that province a system grew up more like the English system, the basis of which was mutual confidence between landlord and tenant, engendered by the application of the spirit, if not the force, of English law and custom. Again, referring to the Irish system, the author says, p. 85, "There, the Roman law, with its enlightened wisdom, never was planted; there its system of permanent tenure never was established; there the ancient English law, with all its just customs, and equitable usages, founded upon the traditions of the Roman law, never was really rooted, to give permanence to tenancy, and confidence to the relations of landlord and tenant. . . . The system of inheritable tenure, founded on the traditions and constitutions of the Roman law, was then established in England; and had the English law been really established in Ireland, that system would have been planted there and produced the same results. But the English law was not so established, and even within the limits of English dominion, a selfish and short-

sighted policy induced the settlers to prefer a native mode of tenure at will, as reducing them to greater dependence. Therefore, at the era of the Tudor dynasty, when in this country the relation of landlord and tenant was so firmly established on a footing of mutual confidence and equitable customs, resting on the traditions of centuries of good and equal law ; and long leases were general, and even yearly tenancy was reliable and long continued ;—in Ireland an uncertain kind of tenure still prevailed, and this uncertainty of tenure produced its necessary result." The native system which the author refers to is vividly depicted by him as the rapacious exaction by a grasping landlord of the utmost profit that the land would yield. While in England good and profitable farming followed upon certainty of tenure, it profited the landlord to grant a long lease, and the tenant was enabled and encouraged thereby to improve and care for the land. Even if the landlord did not grant a lease, it was as much to his profit as to the tenant's to leave the latter undisturbed as long as he paid his rent. In Ireland, on the contrary, the landlords would not grant long leases, and, having the tenants completely in their power, exacted higher rents as the tenants improved the lands, and if the tenant could not or would not pay it, let the land to another. Thus, referring to improvements, the author says, " And all these were to be done by the tenant and taken by the landlord without paying for them. This was in direct opposition to the Roman law, and to the English law which had followed it, and which had been only embodied in local custom. It may admit of question whether, as the English law, including the right of compensation, had been formally extended to Ireland, this was indeed the law in the latter country ; but it was supposed to be the law, and there can be no question as to its injustice or its impolicy, and its necessary effects. It put the tenant in the power of the landlord ; it prevented improvements by the tenant, or made them the means of extortion and exaction, and it gave landlords a motive to keep tenure uncertain, in order to have the power of constantly increasing rents." The tenants being many, and the land

limited in area, the evil had good ground to grow and flourish on. Curiously enough, it seems that the tenants, who were imbued with the traditions of their native system, as a general rule, declined to take leases for a definite term, however long; for it seemed to them to limit their right to occupy the land, whereas, if they held from year to year, it seemed to them that they were practically unlimited as to the duration of their stay. Such a notion was not likely to be dispelled by the landlords, who thereby kept a hand over the tenants and had them completely in their power.

We have quoted at some length, in order to show that the system of tenure in England grew naturally into a certain and free system of holding land; and that the tenure in Ireland was precarious, that traditional feeling prevented the adoption of the English system, and therefore the tenant's interest was small or valueless. We have now to refer to two dissimilar efforts made to remedy the evil of precarious tenure in Ireland. In the one case, the result was to embark upon a series of empirical legislation, of which our adopted enactment is one limb, and which to this day has completely failed of effect.

Referring to the first, Mr. Finlason says, p. 92, "But although, at the beginning of the seventeenth century, the old Irish system of land tenure was thus solemnly declared illegal, and that upon principles which went to the very root of the subject, and tended strongly to show the necessity of permanent and even inheritable tenure, such as had long existed in England, it was quite a different thing to carry out and enforce that decision, and to implant a system of settled tenure in the country where a system had so long prevailed utterly inconsistent with anything like cultivation. With this view, in the North of Ireland, where a vast territory had been declared forfeited to the Crown, grants were made to colonists upon conditions calculated to secure the introduction of English law and English tenure, and thus to promote the improvement of

agriculture. But the conditions were to a great extent disregarded. Notwithstanding, however, this disregard of the original conditions of the colonization, which were in themselves most salutary and based upon the equitable principles of the Roman law, there can be no doubt that the system of land settlement thus established, embodying, as it did, some of the traditional usages of English tenancy, effected a great degree of permanent improvement in the relation of landlord and tenant in that part of Ireland." This experiment, we see then, though not wholly successful in introducing a complete system of English law and usage, was so far attended with success that the spirit of justice and equity which the laws and usages carried with them was reflected in such of the usages as the people found it profitable to adopt—which, after all, is one of the main objects of a mild system of law. The spirit of the law acts upon the usages of the people and is again reflected by them upon their laws, so that by the action of good laws upon the people, and the reaction of the people upon the laws, both the laws and the condition of the people under them continue to improve. The happy result in Ulster is well known. Mr. Finlason quotes from a writer, whom he does not name, thus: "The general result of this settlement was, that large English and Scottish colonies established themselves firmly on the soil of Ulster, overbore the influence of the aboriginal people, and have generally built up the state of society which, for its comparative tranquility and wealth, distinguishes the Province from the rest of Ireland. A powerful colony established itself firmly upon the soil and built up a new order of society, which has been ascendant during two centuries. The usages connected with land which grew out of the intimate ties that bound together the original settlers, took root and modified the whole system of tenure."

To turn now to the second experiment. This was the introduction of legislation for the remainder of Ireland, the condition of which was no doubt lamentable, though due to the perpetuation of a native system which retained

all the harshness, in practice if not in theory, of the system evolved from tribal rule. Mr. Finlason, in speaking of the series of acts which were passed with the design of improving the condition of the tenant, thus refers to the clause which our Legislature in its wisdom has adopted, p. 15: "More recent Acts as to Ireland have, in a similar manner, confused the tenant's claim by complicated conditions and restrictions. And one of these Acts contains the vicious and mischievous declaration, that the relation of landlord and tenant shall rest upon contract alone, and not in any way upon tenure; which, if it had any meaning, must have been astutely designed to deprive the tenant of the protection of the general law of tenure, by which it is conceived the tenant is entitled to compensation for all improvements *bona fide* made." This right to compensation, the author explains, is the customary right to be found in agricultural localities which has the force of law, and not by the pure law of tenure or the common law. Leaving that out of consideration, however, the result is, as we pointed out in our August number, to absolutely deprive the tenant of a valuable species of property which the law of tenure gave him, namely, a term of years. No such property, estate or interest can exist unless by reason of tenure. For this estate, which the tenant could mortgage, assign, deal with as an asset, he has substituted a mere contract, which is most probably purely personal in its relation. The change is well said by the author to be vicious and mischievous. In endeavouring to trace the reason of the change, the author confesses to have failed, but conjectures that it was introduced in the interest of the landlord, and not in that of the tenant. He points out, p. 124, that the Devon Commission had reported that as the common law of England had been formally extended to Ireland, and that thereunder tenants would be entitled to compensation for improvements, and that the claims against the landlord would at that time be formidable, and says, "Perhaps it was on this account the Act contained the otherwise inexplicable enactment, that the relation of landlord and tenant should

thenceforth rest only on contract and not on tenure. The object and the intended effect of this Act was to substitute in the relation of landlord and tenant, for the just and equitable principle of common law or custom, the hard commercial principle of contract, and to render any right of the tenant, either as to duration of tenancy or compensation, dependant on express or implied contract. If the Act of 1860, therefore, had been successful, it would have destroyed any claim by the tenant even to compensation for future improvements, unless in accordance with some contract, express or implied; and, although a usage might be evidence of an implied contract, still it would have been necessary to prove contract. And as to the past, as already stated, neither of the Acts of 1860 contained any provision whatsoever. Neither Act contained any provision calculated to promote security of tenure, or right to compensation. On the contrary, as already seen, one of the Acts contained a clause calculated to destroy the tenant's right to compensation, either as to the present or the past. These Acts, however, happily proved nugatory, and no other measures were brought forward by successive Governments with a view to provide for compensation and for security of tenure."

To this formidable indictment the author adds a quotation from Mr. Tighe Hamilton: "If the law was in a bad state then, it is in a worse now. An Act of 1860, professing to transfer the relation of landlord and tenant from the principles of feudal tenure to those of commercial contract, has allowed it to fall between two stools. The spirit of the age was only half followed. An old and well-understood law—that which still survives in England—was swept away in Ireland, and replaced by a very ill-understood substitute. The Judges of the highest Court of Appeal in Ireland have, by a late decision, laid bare the dangerous state of the law. The present Irish Chancellor, then one of the Judges, remarked that 'it was difficult to exaggerate the importance of their decision to the proprietors of land.' He denounced the Act as 'a ponderous piece of legislation,' full of inconsistency."

What was desired by the tenant was to get fixity of tenure, and compensation for improvements *bona fide* made. Perhaps fixity of tenure would have been sufficient. The Act totally failed to give either. It left the tenant to bargain with the landlord for the land. Where the landlords were few and the area of land limited, and the tenants were many, freedom of contract was impossible, and what was not provided in the contract could not be claimed by the tenant. There were no incidents to his interest, for he had no estate and no rights other than those defined by his contract. The law could not attach implied terms to his contract, for his contract, being definitive, excluded everything that was not covered by it. As Mr. Wm. E. Montgomery said (b), "The functions of the law, moreover, are changed by this substitution of a basis of contract instead of status for the reciprocal rights of landlord and tenant. The law is no longer employed in defining the relative positions of the two classes, but merely in enforcing by its sanction the agreements made between them." If the converse state of affairs had existed—if in other words there had been plenty of land and landowners and few tenants, the evil, which was in part economic, and not altogether legal, would not have existed. Tenants could have made their own bargains.

As if the condemnation of writers, statesmen and Judges were not sufficient, we find in the course of events which succeeded the passing of this Act, a most conclusive and at the same time ridiculous condemnation of its principle. Following it came a demand, not for greater freedom of contract, but for retrogression to a fixed form of contract for all tenants. In other words, having abolished the feudal status of landlord and tenant, to which the law attached well-defined rights and obligations, and having substituted therefor a mere privilege to make a contract, to which the law would attach no incidental terms, the tenants demanded that the law should revert

(b) *Hist. of Land Tenure in Ireland*, p. 127. Cambridge: University Press. 1889.

again to a position rigidly defined by statute, which would again convert the relationship of landlord and tenant into one of status. The new law was to provide nominally a "contract," but really a rigidly-defined relationship or status, with all the relative rights and obligations specified by special Act of Parliament; so that when landlord and tenant met and concurred in forming a tenancy, the Act would fix their rights and obligations by a formula contained in it. In other words, after having tried freedom of contract, the natural desire was to return to status—the sole difference being that the incidents and characteristics of that status, instead of being those well-known incidents defined by common law, were to be defined by statute. A more absolute and unequivocal practical condemnation of this legislation could not well be conceived. The legislation which actually did follow this Act, however, need not be discussed here, because it has no immediate bearing upon the "vicious and mischievous" clause in question. Suffice it to say that the Act of 1860, from which this clause was taken, wholly failed to accomplish anything for the tenantry, and while the so-called contractual position was maintained, more rigid laws were passed limiting and defining the rights of landlords. In fact, when once the Act became a practical measure it was seen that the landlords, having the commodity which the tenants wanted, and the demand being far in advance of the supply, had the tenants at their mercy. Subsequent legislation, therefore, advanced in the direction of reducing the landlords' rights.

Our exhaustive quotations serve to shew that the circumstances preceding the passing of this Act were peculiar, and that the Act totally failed as a remedy. The next enquiry naturally is, what are the circumstances in Ontario that we should begin experimenting with the rejected measures designed for the extra-Ulster Irish. In the first place, Ontario is an agricultural Province, and the whole difficulty in Ireland arose out of pastoral or agricultural tenancies. So far, so good. But, unlike Ireland, the land

in Ontario is not in the hands of a few ; land exists far in excess of the demand for it ; tenants are not scrambling over each other in the wild attempt to get a small patch of ground on which to raise a precarious crop ; the small farmer in Ontario is not the ignorant peasant smarting under imaginary wrongs and attributing his misfortunes to everything except the real cause. The circumstances are as different from those of the Irish as are the English circumstances. In England, no such law is clamoured for, none is necessary. In Ulster, where the spirit of the English tenures and customs has changed the whole system of land-holding and made it a prosperous and contented Province, no such law is asked for, none is necessary. And it passes comprehension that in Ontario where the English system prevails, where there is no racial, politico-religious disturbance, such as in Ireland, and where the economic conditions are the exact opposite of those in Ireland, it should have been thought necessary to embark upon a system of unsatisfactory legislation which must necessarily be totally experimental, and only tend to render uncertain the laws of property. It is in short nothing but legislative vivisection—experimenting upon a living, healthy body politic and economic, without regard to the unfortunate subject's feelings or the ultimate effect of the experiment upon its very life.

It has been seen that the oppressed condition of the tenantry and the fierce competition for the land placed them at a disadvantage with the land-owner, and disabled them from making fair terms for the land. Both Montgomery and Finlason, in the essays quoted from, remark that this was one of the many vices of this legislation—that while it offered perfect freedom of contract to both landlord and tenant, there was in fact no freedom on the tenant's part. It may be said that the economic conditions of Ontario are such that the same objection would not apply to the legislation here. But the argument proves too much. It is simply stating as a fact that the conditions here do not call for the passage of the Act. It

was this miserable condition of the tenant who clung to his ancestral system of tenure which placed him entirely in the power of the landlord, that caused the passage of this misapplied remedy. The English system was successful both in England and in Ulster, and let us add, in Ontario also. To introduce the Act under such circumstances is entirely to misunderstand its original purpose; and to insist upon it in spite of its complete failure as a basis for the relationship of landlord and tenant, is to misunderstand its effect.

There are other serious considerations connected with this enactment. When it is considered that an ancient system of law, evolved by natural processes, and adapted from time to time to the growing needs of the community, is suddenly displaced, and an entirely new system (if such it can be called) substituted for it, it would naturally strike a thoughtful person that the new system should be carefully designed, analyzed in all its parts, and rendered as complete and harmonious as possible. It is not surprising to find, therefore, in the original Act that most minute and sometimes complicated provisions were made in order to anticipate and provide for the changed state of affairs. The Act is a very long one, and provides for a great variety of matters. Torn from its surroundings, we have one solitary clause introduced as the basis of the whole law of landlord and tenant in Ontario, without a single provision made for the novel situation.

We have already pointed out, and it will bear repeating, that under this enactment the landlord has no incidental rights. The right of distress which was annexed by law to his landlordship has disappeared. If he desires to retain this right he must bargain for it. But to what extent can he acquire it? Plainly, not to the extent to which he formerly had it. For as his right now must depend upon contract, the tenant, if he submits to this as a term of the bargain, can only give the landlord the right to take his (the tenant's) own goods. Even the salutary exceptions contained in the statute of exemptions from

distress will no longer be exceptions ; for the tenant cannot contract that the goods of the wife, son, daughter or other relative on the premises shall be the subject of distress. The landlord can get nothing more than a license to take the tenant's goods. Then, again, if the tenant clandestinely removes them to avoid distress, can the landlord follow them ? Apparently not, unless his contract permits it. The right to do so under the old statute was annexed to the relationship ; but the ancient status having been destroyed the incidents must go with it. It will be found that, in order to entitle a landlord to follow the goods he must have a contract to entitle him to do so. He must even have a contract to entitle him to distrain for the costs of distraining. On the tenant's part, can he insist upon an inventory and appraisement being made, and all the ordinary precautions being taken to ensure him against the rapacity or ill-usage of the landlord ? Apparently not, unless he has a contract therefor. Again, can the tenant claim the exemption of his own goods which the statute gives him, and throw up his tenancy ? That depends upon his contract. Can he require the landlord to restrict his right of distress to the amount of rent fixed by our statute ? That again depends on the contract. A general right to distrain acquired by contract would necessarily entitle the landlord to distrain for all arrears, and would not entitle the tenant to claim exemption or give up his lease unless it is so nominated in the bond. Evidently there is a very carnival of law and litigation ahead for both landlord and tenant.

Can a tenant remove trade fixtures under this enactment ? The landlord may well say, "What does the contract say ? Everything attached to my land is mine. Does your contract permit you to remove them ? If not, leave them." It is a hopeless task to endeavour to enumerate the multitude of questions that will necessarily arise.

Perhaps the most serious question that will present itself is that as to the effect of the enactment on present leases.

If it does not in fact affect them, we shall have a large amount of valuable land in cities, which is let upon long and renewable leases subject to one law—the law of tenure, and all the remaining land subject to another law—the law of contract. If the enactment does affect them, then it deprives both parties of the liberty of adding to their existing contracts many terms which they would have added thereto if the present state of affairs had existed when the leases were granted. It may be said, off-hand; that the law is not retrospective. But it is possible to hold it prospective only, and yet to affect the relationship. The parties have a contract. Their whole rights are deemed to be founded on contract henceforth. The tenant is not to be the feudatory of the landlord, but must look to his contract. The question is a serious one. Even if it were held that it did not apply to existing leases, what about the renewals? The tenant can claim a renewal lease under the covenant for renewal. The new lease will have to be drawn up in the terms of the old one in order to conform to the covenant. The landlord may say, "As the law now requires that our future relationship is to be governed by our contract solely, I want many provisions inserted as express terms of our bargain which before were satisfactorily understood to be attached to my right by law." The tenant may well reply, "I will agree to nothing but the terms of the old lease." What is to be done? Again, can the landlord evict his tenant for non-payment of rent or breach or non-performance of covenants? Look at the contract, what does it say? Breach of contract, failure to pay money due thereunder, have only their appropriate remedy of action of damages for the breach or to recover the debt. If the tenant fails to pay his rent he may be sued therefor, or distrained upon if the lease permits it. If he breaks his covenants he may be sued for damages. But why should he be put out of his holding? He has a contract to hold for a time certain. And unless his holding is, by the contract, made dependent on his performance of all his duties, he will be able to hold in defiance of the landlord.

Again, what is the position of a tenant who desires to assign? He hires the land as he would hire a pair of horses or a cart (c). He has a contract to occupy the land. Can he substitute another person for himself without the landlord's consent? At common law he had an estate which he could convey. But the relationship was such that the law permitted the landlord to take away from that estate its natural characteristic of alienability by a term of the lease, on the ground of his primary and natural right to select his own tenant. If this right still exists, then the tenant, having no estate to convey, but merely a right to occupy the land, has nothing to assign, and may not introduce another person as a substitute for himself, with whom the landlord has no contract, and with whom he may refuse to contract. It is, of course, to be borne in mind that choses in action arising out of contract are assignable; but this must not be confused with the assignment of the benefit of the contract itself. Assuming, however, an assignment to be made, what right has the landlord to demand rent from the assignee? It is idle to say that the covenant to pay will run with the land. This assumes a written lease and leaves parol leases unprovided for. But no estate passes with the assignment—only the substitution of one person for another in the contract. Under the old law the landlord could bring an action of debt on the demise. Under the present law he must sue on the contract. But he has no contract with the assignee. It really involves the creation of a new contract with the proposed assignee. This again discloses a new advantage for the landlord. The tenant probably gets a consideration. The landlord takes the consideration for his assent; and the proposed assignee's consideration is drifted into the landlord's pocket, as the price of his new contract.

It is to be hoped that we have not exaggerated the importance of this enactment. Even a hasty perusal of the two essays to which we have referred—the only works on

(c) Montgomery, p. 125.

the subject within reach—will convince any one of the purely experimental nature of the enactment; that as a remedy designed for peculiar circumstances it is wholly unsuited to the widely different circumstances of this Province; that as a measure of relief for the conditions which were supposed to call for it, it proved a complete failure. A moment's thought will satisfy anyone that it is fraught with very serious consequences to both landlord and tenant, and that the utmost care must be exercised in drawing up a contract under the enactment in order that the interests of both parties may be protected. The best wish that we have for this adopted child is that it may be consigned to an early grave.

EDITORIAL REVIEW.

Statement of Prisoner in Previous Proceeding.

In *Regina v. Madden*, 14 Occ. N. 505, it appeared that the prisoner had, on cross-examination in a proceeding before a magistrate in which he was complainant, made certain statements which tended to incriminate him in this proceeding. The statement was tendered in evidence and was received, but a case was reserved to try the admissibility of the statement. The prisoner had not claimed privilege on the proceeding before the magistrate. Armour, C.J., and Street, J., held that the evidence of his previous statement was properly received in evidence, giving as a reason that he had not claimed privilege before the magistrate.

A similar question arose in *Regina v. Welter*, 15 Occ. N. 272. The prisoners were indicted for murder. At the coroner's inquest one prisoner had made a statement which was tendered in evidence on the trial for murder, and was objected to. Meredith, C.J., rejected it, holding that the coroner's court was a criminal court and that the Code applied to make inadmissible the prisoner's statement. The previous case of *Regina v. Madden* was apparently not cited to his Lordship.

In the absence of a full report of their Lordships' reasoning in *Regina v. Madden*, it is not quite clear why the question of privilege should be deemed to weigh with the Court in determining the question. The statute is silent on the subject. It declares that no person shall be excused from answering any question on the ground that his answer may tend to criminate him; and a proviso which follows declares that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other

than a prosecution for perjury in giving such evidence. The prisoner has no choice to claim privilege. He cannot excuse himself from answering. He can be compelled to answer. But then the statute itself provides the privilege. His answer shall not be receivable in evidence in a proceeding thereafter instituted against him. In *Regina v. Madden* it was held that it was receivable, because he had not claimed privilege. But if he had claimed privilege, he would have been told that he had none, and that his answer could not thereafter be used against him.

In the meantime, we have a decision by two Judges on a case reserved, which must overrule the decision of a Judge at the trial, although the latter seems preferable on *a priori* reasoning.

Dissolution of Union School Sections.

In this matter we have two contradictory decisions on identically the same point. In *Re Union S. S. East and West Wawanosh*, 15 Occ. N. 135; 26 Ont. R. 463, a case was submitted by the Minister of Education for the opinion of the Court on the following state of affairs. In 1893, arbitrators, appointed to consider the readjusting of the boundaries of a union school section, awarded that no action should be taken in the matter of the petition. In 1894, petitions were again presented for the appointment of arbitrators to consider the same question. The Chancellor, on this state of facts, held that the award of 1893 was an award within the meaning of the Act, which declares that "no union school section shall be altered or dissolved for a period of five years after the award of the arbitrators has gone into operation," and that a status was created which could not again be interfered with for the period of five years from the making of the award.

In *Hullett v. Lockhart*, 15 Occ. N. 274, an exactly similar state of facts was presented upon a contested motion, and Meredith, C.J., held that the prohibition against disturbance for five years did not apply to the case

of an award that no action should be taken in the matter of the petition, but only to cases where some change had been effected by the award. It is plain that in order to support this case an award which continues the status without change cannot be an award under the Act. This is evidently not the intention of the statute. Section 88 of the Act, 54 Vict. cap. 55, provides for an appeal to the County Council from every award affecting territory wholly within the county. It would, we think, be idle to contend that an appeal would not lie from an award which continued the existing state of affairs and refused a change. It is an award in as true a sense as where a change is made. To say that an award making a change is an award and appealable, but an award not making a change is not an award and therefore not appealable, is to travel outside the statute for the law. If both are awards, both become operative, the one to effect the change, the other to prevent it. It only requires that the award shall "go into operation" in order to prevent another disturbance for five years; and "going into operation" clearly means becoming a valid award. If the award is invalid or void, it is inoperative, but if valid it operates according to its purport. Its operation lasts for five years, and then another attempt may be made. The policy of the statute seems to be that the status found at any particular time by arbitrators shall be the status for five years, just as equalization of assessments in certain cases can take place only at certain periods. It takes it for granted that in five years events may occur which will necessitate the readjustment of boundaries; but it is explicit that no event which happens within that period shall be sufficient to put the arbitrators again in motion.

Is there no remedy then in such a case? We think that the statute provides one, and the very provision so made strengthens the opinion that the Chancellor's decision is the sound one. In the section which fixes the prohibitory period of five years, it is enacted that "nothing herein contained shall be construed as restraining any Municipal Council from enlarging the boundaries of any union school

section from time to time as may be deemed expedient." That is to say, although no proceeding by arbitration can take place for five years, yet such jurisdiction as the Council may have to enlarge a union school section is not suspended. That affords a strong indication that there is an outlet, but only one, after an award has been made.

The opinion that an award refusing to alter boundaries does not bind the parties for five years would very easily lead to the making of awards expressly designed to evade this interpretation. It would be very easy for arbitrators, acting upon this view, and foreseeing the disturbance and expense that would arise from an annual agitation of the matter, to make an award slicing off or adding an infinitesimal and valueless portion of land, not because the change was needed, but because the settlement of the question for five years is preferable to a state of ferment brought about by ten discontented ratepayers.

What is a Building ?

It often occurs that the simplest and most commonly used terms and phrases occasion the greatest difficulty when they come to be interpreted in Courts of law. Why is this? Undoubtedly because the commonest words and phrases are, as the very expression implies, most in use, and bear therefore the most elastic and extensive significations. For this reason the commonest words and phrases are used when the intention is to give an instrument the most comprehensive effect. When such phrases come to be interpreted, the natural tendency, as it seems, of Courts is to contract and narrow the signification of such terms when a dispute arises as to their meaning. The primary and sometimes the etymological signification is looked at, and as little departure therefrom as possible is allowed on the hypothesis that the parties used the term in its limited or primary sense, as exclusive, rather than in its commonly-received and elastic or comprehensive sense.

Such was the fate of the phrase "building and erections," used in a renewable lease in *Adamson v. Rogers*,

22 App. R. 415. The lease was of a parcel of land covered with water. The purpose of the lease was to enable the lessee to build. The lessor agreed to advance money to build if the lessee built within the first five years of the term. In other words, the agreement was, as succinctly put by Mr. Justice MacLennan, as follows:—"There were here two business men agreeing for a lease of a piece of land covered with water, land ordinarily used and doubtless intended to be used for wharf and storage and shipping purposes, etc." It is surprising then to find that the conclusion of the Court of Appeal was that the value of the "visible" part of the erections and buildings only could be recovered by the tenant on the refusal of the landlord to renew. Although the purpose of the lease was to construct a wharf, with necessary superstructures, the contemplation of the parties did not extend to the wharf or crib-work as a building or erection within the meaning of the lease. In other words, the landlord says, "I know you are a wharfinger; I lease you my land for the purpose of carrying on your trade; I want you to build; I will advance you money to build with; and if I do not renew the lease I will repay you for your buildings." When he is asked to pay for the buildings contemplated by the lease he says, "Buildings when constructed by a wharfinger of course mean a wharf with superstructure, but when paid for by landlord mean the superstructure only."

The reasoning of the Court does not convince one either that "buildings and erections" does not include that which is essential to maintain the superstructure, or that the Court has arrived at what was actually the meaning and intention of the parties. It is one thing to say, "Let us look at the exact meaning of the phrase used, and when we ascertain carefully the precise meaning of the term, then we can say whether the parties, having used the term in such a precise way (which we conclusively presume against them), did or did not intend to include or exclude something not within that precise meaning." It is quite another thing to say, "Let

us put ourselves in the position of the parties, look at the trade of the lessee, the indisputable purpose of the lease, the nature of the structure contemplated; let us, as Mr. Justice Ferguson said, 'deny ourselves no light or information that they had,' and then let us see whether the phrase used is strong enough to exclude the claim."

In other words, ought we first to apply the sciences of grammar and lexicography to determine the classical sense of the word, and then argue from the assumed premiss that the parties used it in the exclusive sense? Or ought we to apply the common sense of business men using language in the vernacular sense, and then see whether the phrase is so restricted in its meaning that it must necessarily exclude a proffered interpretation? The latter seems to be the preferable mode of interpretation. If the strict interpretation of the Court of Appeal is to govern, nothing but a balloon or an ark would answer the purpose of the lessee.

The word "building" has a wider sense in ordinary language than the Court seemed willing to accord it. In the Encyclopædic Dictionary "build" is defined as meaning "to raise or bring into existence anything on any ground or foundation." Now a crib-work filled in with earth to be used as a structure for the double purpose of a wharf and a support for a storehouse comes within this definition in every sense. The Court, however, treats such work as "raising the surface of the land so as to render the demised premises suitable for the erection thereon of buildings." The use of the word defined in a definition is contrary to all correct canons. If we assume that by "building" was intended only the superstructure, then it is perfectly correct to say that the ground was prepared for the building or superstructure. But if the very point to be determined is the meaning of the word "building," then we do not advance the matter by giving a detailed account of the lower process of the structure. To say that the structure in question was composed of crib-work filled in with earth, and was therefore not a building, is equivalent to

saying that a stone foundation resting on wicker or plank supports (as is done in wet soil) is a mere collection of planks, stones and cement put together in a certain order, so that the locality may be prepared for the building that is to be put thereon. The Court thought it a strained interpretation to speak of the crib-work and earth as the foundation of the superstructure. But if it is not the foundation, what is? Suppose that the lessee had stated to a friend that he had built a new storehouse in the harbour, and his friend had asked him what kind of a foundation he had built, the most natural, true and accurate answer would have been "a crib-work filled in with earth."

Even if we look at the purely legal interpretation of what were the demised premises we must arrive at the same result. The land demised is below the water. The water does not belong to the landlord, and he does not profess to lease it. He leases the land. Everything "raised above" the surface of the land, whether below the surface of the water or above it, is "erected" on the demised premises. If the tenant had laid a foundation of cut stone connected together closely so as to keep out the water, and had used that as a wharf and foundation for the storehouse, undoubtedly that would have been a building—especially if he had pumped out the water and had used the interior as a cellar. Why should not a wood and earth structure be as much a foundation as stone? And why should not such a structure, when placed on the surface of the demised premises, not be deemed to be "raised up" or erected thereon merely because it is under water?

Society of Comparative Legislation.

The Society of Comparative Legislation, which it was proposed to form, after the reading of a paper before the Imperial Institute at the end of last year by Sir Courtenay Ilbert on the subject of Comparative Legislation, has been formed and is now in existence. The officers, council and

executive committee comprehend many of the most celebrated lawyers, the Lord Chancellor being president. The information to be gleaned by the Society is to be edited and published from time to time for the use of the members. Inasmuch as the Society can accomplish but little without the aid of the colonies (there are fifty-nine Legislatures in the Empire outside of Great Britain), it is desired that the Society should extend itself as much as possible. It is therefore intended that branches should be established in the different colonies and possessions of the Empire.

The annual subscription is one guinea, payable to the Society's Bankers, Messrs. Child & Co., 1 Fleet St., E.C., or to either of the Honorary Secretaries, Thomas Raleigh, Esq., All Souls College, Oxford, and Albert Gray, Esq., 2 Paper Buildings, Temple, E.C., London.

THE CANADIAN LAW TIMES.

NOVEMBER, 1895.

RIGHTS OF WAY.

THOUGH in England a way may be acquired by prescription by the inhabitants of such and such a hamlet, it has been decided in Ontario that, as there is no such thing as custom or immemorial usage, no such right could arise here (*a*). Our remarks will therefore be confined to private rights of way, with a reference to those which arise by reason of sales according to plans having streets laid out thereon.

Rights of way then may be created by grant, express or implied, and by prescription or user.

By express grant.—In case of an express grant the language of the deed is primarily to be referred to in ascertaining the extent of the right (*b*), and it is thus a pure question of construction. But the surrounding circumstances, the nature of the road, the purposes for which it is intended (*c*), and the nature and state of the dominant tenement (*d*), are also to be regarded in aid of the bare interpretation of the grant.

(*a*) *Grand Hotel Co. v. Cross*, 44 U. C. R. 153.

(*b*) *Williams v. James*, L. R. 2 C. P. 577.

(*c*) *Cannon v. Villars*, 8 Ch. D. 415.

(*d*) *Allan v. Gomme*, 11 A. & E. 759; *South Met. Cem. Co. v. Eden*, 16 C. B. 42.

So it has been held that a grant of a way must be co-extensive with the requirements of the dominant tenement (*e*); but on the same principle the use may be restricted to the purposes for which the way was originally required. The question is not one that is easy of solution. On the one hand, it may be said that the grant is to be taken most strongly against the grantor; and on the other, that the servient tenement is not to be burdened beyond the limits expressed in the deed (*f*). It has been said that when no limit is set in the grant the way may be used for all purposes (*g*); but this case and others of the kind (*h*) were cases in which large quantities of land were laid out with ways through them for the general use of the purchasers, and would, perhaps, correspond to the laying out and sale of lands by plans showing streets thereon. On the other hand, where a lease reserved a "right of way on foot and for horses, cattle and sheep," it was held that it did not include a right of way to lead or draw manure over it (*i*); and a grant of "the free liberty and right of way and passage, and of ingress, egress and regress to and for [the lessee] and his workmen and servants, and all and every persons and person, by their or his authority, etc.," gave a right of way for foot passengers only (*j*).

A grant of a right of way over a piece of land or a road does not necessarily carry with it the right to use the whole parcel (*k*). A grant of a right of way over and along "the roads or intended roads and ways delineated in the plan," according to which sales were made, in a deed which provided for the laying out and maintaining of roads, was held to give the grantee the right to a

(*e*) *Watts v. Kelson*, 6 Ch. App. 166.

(*f*) *Williams v. James*, L. R. 2 C. P. 577.

(*g*) *United Land Co. v. G. E. R. Co.*, 17 Eq. 158; 10 Ch. App. 586.

(*h*) *Newcomen v. Coulson*, 5 Ch. D. 135; *Finch v. G. W. R. Co.*, 5 Ex. D. 254.

(*i*) *Brunton v. Hall*, 1 Q. B. 792.

(*j*) *Cousens v. Rose*, 12 Eq. 366.

(*k*) *Hutton v. Hamboro*, 2 F. & F. 218.

reasonable user of the road only, and not a right to use every square inch of it; and consequently a slight encroachment on the road made by the covenantor in the deed was held not to be an interference with the right of user of the road (*l*). It would have been otherwise if the grant had been of a road of a specified width. But where premises were demised to a wood-carver for a workshop by reference to a plan on which the demised premises were shown, together with a right of way over an adjoining parcel coloured green on the plan, and it was shown that large loads of lumber were taken in by the lessee, and the whole parcel was necessary for the convenient use of the demised premises, it was held that the lessee had the right to use the whole parcel (*m*); and where a demise of a dock included right of way and passage over a roadway or passage twenty-three feet wide adjoining the dock, it was held that the lessor could not fence off fourteen feet of the way (*n*). Probably this case can be reconciled with *Clifford v. Hoare* only on the ground that the disturbance in the former substantially interfered with the use of the way, while in the latter case there was no appreciable interference.

The extent of user of a way may be determined by the state of the dominant tenement taken in connection with the words of the grant. Thus a right of way to a wicket to be made in a garden was held to entitle the grantee to use it for carts; and although the wicket was not made, but the grantee, instead thereof, built a cartshed, it was held that he did not exceed his rights (*o*). But where a right of way was reserved on a grant to a place "now used as a woodhouse," while it was held that on the construction of the grant these words were merely descriptive of the locality and gave a right of way to the locality, they did not authorize the dominant owner to use the way for cottages which he subsequently built on the space

(*l*) *Clifford v. Hoare*, L. R. 9 C. P. 362.

(*m*) *Knox v. Samson*, 25 W. R. 864.

(*n*) *Cousens v. Rose*, 12 Eq. 366.

(*o*) *Watts v. Kelson*, 6 Ch. App. 169, note.

described. The change was a change in substance of the purpose, not a mere change in quality of the same purpose (*p*). So in *Henning v. Burnett* (*q*) a grant of a right of way to a dwelling-house, coach-house and stable did not entitle the grantee to build up the way and use it to enter a field, the way having been granted for a specific purpose. And in the *South Met. Cem. Co. v. Eden* (*r*), a grant of a way to certain lands, or any part thereof, was held to give a right of way to the lands in any condition and for any purpose. Jervis, C.J., distinguished the case from *Henning v. Burnett*, which was a grant for a specific purpose or to a specific point, and said, "If I grant a way to a cottage which consists of one room, I know the extent of the liberty I grant; and my grant would not justify the grantee in claiming to use the way to gain access to a town he might build at the extremity of it."

Nor can a way be put to a more burdensome use than was originally intended. The nature of the enjoyment of an easement at the time of the grant is the measure of enjoyment during the continuance of the grant (*s*).

A private way should have a *terminus a quo* and a *terminus ad quem*. And the way cannot be used for the purpose of going to a place beyond or other than the dominant tenement, nor can a merely colourable use of the dominant tenement be made for the purpose of going beyond it—as by carting building material to the dominant tenement and depositing it there, and subsequently taking it to another place, its original and real destination (*t*).

(*p*) *Allan v. Gomme*, 11 Ad. & E. 759; doubted in *Henning v. Burnett*, 8 Ex. 187.

(*q*) 8 Ex. 187.

(*r*) 16 C. B. at p. 57.

(*s*) *Heward v. Jackson*, 21 Gr. 263; *McMillan v. Hedge*, 14 S. C. R. 736.

(*t*) *Howell v. King*, 1 Mod. 190; *Colchester v. Roberts*, 4 M. & W. at p. 774; *Skull v. Glenister*, 16 C. B. N. S. 81; *Telfer v. Jacobs*, 16 Ont. R. 35.

A public road differs from a private way in this, that the dominant owner can enter the private way only at the accustomed or usual part (*u*); but where land abuts upon a highway the adjoining proprietor is entitled to enter the highway from any part of his land (*v*); and if a private way leads to a highway, the one entitled to the private way may, on reaching the highway, go whither he will; for on reaching the highway he uses it, not by virtue of his easement, but in exercise of a public right (*w*).

Several rights of way may co-exist over the same road (*x*). A familiar instance of this is where land is plotted out on and sold according to a plan, and grants of lots are made to various persons with the right to use the roads laid out in the plan.

In England it is held that a private right of way may co-exist with the right of the public to use the same land as a highway, the public right being acquired subsequent to the grant or other acquisition of the private way. The owner of the soil, having granted a way or allowed it to be acquired by prescription against him, cannot afterwards dedicate the land absolutely to the public as long as it remains subject to the private right. He can only dedicate it subject to the existing right (*y*). The owner of the way is not bound to justify his user as one of the public on what might be conflicting evidence of public user; and he consequently may maintain his title by the private right (*z*).

The law is probably the same in this province. So where a private right was claimed, and the defendant pleaded that the land over which the way was claimed had been a

(*u*) *Woodyer v. Hadden*, 5 Taunt. at p. 132.

(*v*) *Berridge v. Ward*, 2 F. & F. 208.

(*w*) *Colchester v. Roberts*, 4 M. & W. 769.

(*x*) *Semple v. Lon. & B. R. Co.*, 9 Sim. 209.

(*y*) *R. v. Chorley*, 12 Q. B. 515; *Duncan v. Louch*, 6 Q. B. at p. 915; 1 M. & G. at p. 401.

(*z*) *Allen v. Ormond*, 8 East 4.

public highway and had been closed by the municipality, the Court allowed a demurrer to the plea on the ground that the antecedent right of way might still be extant, notwithstanding the facts averred in the plea (a). And in *Re Vashon & East Hawkesbury* (b), under a somewhat similar state of facts, Osler, J., said, "I do not, of course, mean to say that his private right of way is or can be at all affected by the law" closing a highway over the same lands. In this case the observation was a mere *dictum*, the point not being involved; and in the former case the question was a mere matter of pleading.

The question must be considered with reference to the provisions of the Municipal Act. No doubt the proposition is true that a grant or dedication cannot affect a pre-existing right, but must be subject to it. But in England the fee in the soil remains the property of the person dedicating, the public acquiring a right to use the land for the legitimate purpose of a highway only (c). By the Municipal Act "the soil and freehold of every highway or road altered, amended or laid out according to law, shall be vested in Her Majesty, her heirs and successors" (d). And it is further provided that every public road, street, bridge or other highway in a city, township, town or incorporated village shall be vested in the municipality, subject to any rights in the soil which the individuals who laid out such road, street, bridge or highway reserved (e). As to all original road allowances, the former having passed from the Crown, there could not be a private right of way thereon, nor a dedication of a public way (f). But as to land dedicated to the public for a highway, though it ultimately becomes a highway to the same extent as an original road allowance (g), there is a special saving of rights reserved by the

(a) *Johnson v. Boyle*, 11 U. C. R. 101.

(b) 30 C. P. at p. 202.

(c) *Harrison v. Duke of Rutland*, L. R. (1893) 1 Q. B. 142.

(d) Con. Mun. Act, 1892, sec. 525.

(e) *Ibid.* sec. 527.

(f) *Rae v. Trim*, 27 Gr. 374.

(g) *Re Trent Valley Canal Co.*, 11 Ont. R. 687.

owner, dower being excepted (*h*). If a private right existed before dedication, it would apparently continue to exist after the dedication and vesting in the municipality of the public way as a right in the soil reserved, or incapable of conveyance or dedication by the individual who laid out the road. And the owner of the private right might justify his user on that ground, if the public right were doubtful, or notwithstanding the public right. The municipality could acquire by the grant or dedication only such right as the owner could grant, i.e., a public right of user subject to the private right. It could, however, acquire the private right of way by expropriation. Such roads are, however, equally with original road allowances, subject to be closed by the municipality (*i*) under the authority of the Municipal Act (*j*). But "no council shall close up any public road or highway, whether an original road allowance or a road opened by the Quarter Sessions or any municipal council or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his lands or place of residence, over such road, unless the council in addition to compensation, also provides for the use of such person some other convenient road or way of access to the said lands or residence." The provision as to supplying other means of access was first enacted in 1893 (*k*), after *Johnson v. Boyle* (*l*) was decided, but before *Re Vashon & East Hawkesbury* (*m*). The section in question postulates the non-existence of any means of access to the land served by the highway on its being closed, and requires such access by a convenient way to be made, if it does not already exist in another place (*n*); and the municipality is author-

(*h*) Ibid. sec. 527 a.

(*i*) *Moore v. Esquesing*, 21 C. P. 277.

(*j*) Con. Mun. Act, 1892, sec. 550.

(*k*) 36 Vict. cap. 48, sec. 422.

(*l*) 11 U. C. R. 101.

(*m*) 30 C. P. 194.

(*n*) *Re McArthur & Southwold*, 3 App. R. 295.

ized, on closing a road, to offer the land for sale, first to the owner of the adjoining land, and if he refuses, then to any other person. This is not conclusive, however, that the private right is extinguished by closing the highway. It is quite possible that on closing a highway the municipality might refuse to provide "some other convenient road," on the ground that the private right of way still existed, the dedication of the road having been subject to it, and the closing of the highway being the withdrawal of the public right only which the municipality acquired by the dedication. And although the conveyance of the land to the person owning the private way would extinguish it, there is no reason why, upon the conveyance of the land to another person, the private right should not still be exercised.

Roads and streets laid out upon a plan stand in a peculiar position. At one time, the registration of such a plan did not constitute a dedication to the public of the streets laid out thereon (*o*). And in townships, including hamlets and unincorporated villages, that is still the law (*p*). The owner of the land has, however, still a controlling interest in the streets, and is not bound by the plan until he has made a sale under it (*q*). Upon a sale being made the purchaser becomes entitled to an easement, in common with other purchasers of all those streets abutting on his land which are necessary for the material enjoyment of his property, but not in any other streets unless he expressly stipulates for it (*r*). His rights are still, however, subject to the control of the County Judge, who may, upon notification of all parties concerned, alter the plan and even the streets (*s*). In cities, towns, and incorporated villages all

(*o*) *Re Morton & St. Thomas*, 6 App. R. 323.

(*p*) *Sklitzky v. Cranston*, 22 Ont. R. 590.

(*q*) *The Reg. Act*, 1893, sec. 102; *Re Chisholm & Oakville*, 9 Ont. R. 274; 12 App. R. 225.

(*r*) *Carey v. Toronto*, 11 App. R. 416; 14 S. C. R. 172; *Re McIlmurray & Jenkins*, 22 App. R. 398.

(*s*) *R. S. O.* cap. 162, sec. 65; *The Reg. Act*, 1893, sec. 102; *Roche v. Ryan*, 22 Ont. R. at p. 109.

the streets, roads and commons shown on a plan become public highways, subject, however, to the same control as in other cases, but the municipality is not bound to keep them in repair until it accepts them by by-law (*t*).

By implied grant.—We have seen that where land is granted according to a plan showing roads and streets thereon, the purchasers acquire the right to use such of the roads and streets as serve the purchased premises (*u*). Where, however, a vendor sells according to such a plan there is no obligation cast upon him to construct the roads at his own expense, in the absence of an express agreement to that effect. The extent of his obligation is not to divert the ground appropriated for the roads to other purposes (*v*). And where a mere intention to lay out roads is expressed the vendor may abandon or alter his intention without incurring liability (*w*).

Where, also, a grant is made of a parcel of land abutting on a road, street or lane (*x*), or a road is staked out on the ground and is mentioned in the grant, the grantee is entitled to use the whole way so mentioned or staked out (*y*). And where premises were described as abutting on a road on one side, it was held that the grantor could not afterwards set up, as against the grant, that a space lying between the premises granted and the road was not to be used by the grantee (*z*).

Other ways by implied grant are ways of necessity. A way of necessity arises where a landlocked parcel is granted, so that it is wholly inaccessible unless the grantee is permitted to use the surrounding land as a means of approach. He is, therefore, entitled to a way across the

(*t*) R. S. O. cap. 152, sec. 62.

(*u*) Ante, p. 276; see also *Rossin v. Walker*, 6 Gr. 619.

(*v*) *Cheney v. Cameron*, 6 Gr. 623.

(*w*) *Harding v. Wilson*, 2 B. & C. 96.

(*x*) *Adams v. Loughman*, 39 U. C. R. 247; *Espley v. Wilkes*, L. R. 7 Ex. 303.

(*y*) *Wood v. Stourbridge*, 16 C. B. N. S. 222.

(*z*) *Roberts v. Karr*, 1 Tannt 495.

land of the grantor to and from the landlocked parcel. And where the surrounding lands are granted and the landlocked parcel is retained, it is said that in this case also a way of necessity arises by implied re-grant to the grantor of the surrounding land.

First, of ways of necessity by implied grant. The way must be actually necessary, and not merely convenient (a). It is a good answer to a claim for a way of necessity that another way, though not so convenient, exists (b). So, where a way of necessity was claimed because a blind wall of the grantee's house abutted on the highway, the Court answered that the "defendant might make a way by breaking through his wall" (c).

A way of necessity can exist only when a grant can be implied (d). So, where a parcel which was landlocked escheated, it was held that no way of necessity passed to the lord of the fee (e); and as such a way can only arise upon a grant of the soil, an equitable owner was held not entitled to maintain an action for such a way without joining the holder of the legal estate as a party (f). But a way of necessity will pass where the landlocked parcel is acquired by devise (g). Where a grantee is entitled to a way of necessity the grantor has the right to assign the way (h); but if he neglects to do so, the grantee may select the way himself (i). The way, when selected by the

(a) *Dodd v. Burchell*, 1 H. & C. 113; *Holmes v. Goring*, 2 Bing. 76.

(b) *City of Hamilton v. Morrison*, 18 C. P. at p. 224.

(c) *Barlow v. Rhodes*, 3 Tyr. at p. 284; *Pheysey v. Vicary*, 16 M. & W. at p. 490.

(d) *Pomfret v. Ricroft*, 1 Wms. Saund. p. 323 a, note (c).

(e) *Proctor v. Hodgson*, 10 Ex. 824.

(f) *Saylor v. Cooper*, 2 Ont. R. 398. See *Lupton v. Rankin*, 17 Ont. R. 599.

(g) *Dixon v. Cross*, 4 Ont. R. 465. See also *Briggs v. Semmens*, 19 Ont. R. 522.

(h) *Clarke v. Rugge*, 2 Rol. Abr. 60, pl. 17; *Bolton v. Bolton*, 11 Ch. D. 968.

(i) *Fielder v. Bannister*, 8. Gr 257; *Dixon v. Cross*, 4 Ont. R. 465.

grantor, need not be the most convenient one for the grantee (*j*), but it should be reasonably convenient (*k*).

It must be borne in mind that the means of access to the land must in such cases be considered solely with regard to reaching a point in the limit of the landlocked parcel; "a way of necessity," said Rolfe, B. (*l*), "means a convenient way to the close, not to the house as here claimed."

A way of necessity is such a way as is necessary or suitable for the grantee at the time of the grant, and the right does not increase with the increase of the necessitous circumstances of the dominant tenement (*m*). So, if the way leads to agricultural land at the time of its inception, the dominant owner cannot subsequently claim a right of way suitable to the user of his tenement as building land. The way lasts only as long as the necessity for it exists. Consequently, if the dominant owner acquires other means of access to the highway, his right of way by necessity ceases (*n*). But changing the locality of the way from time to time does not destroy it; and where a grant of a specific way was made, and a purchaser of the dominant tenement bought it without notice of the specific grant of the way, it was held, nevertheless, that the way of necessity was not lost (*o*).

Secondly, as to ways of necessity by implied re-grant. When the surrounding land is granted and the landlocked parcel is retained, it is said that the grantor has a way of necessity over the surrounding lands (*p*). This, although apparently established by the authorities, is contrary to the principle upon which a way of necessity by implied

(*j*) *Pheysey v. Vicary*, 16 M. & W. at p. 496.

(*k*) *Fielder v. Bannister*, 5 Gr. 257.

(*l*) *Pheysey v. Vicary*, 16 M. & W. at p. 495.

(*m*) *Gayford v. Moffatt*, 4 Ch. App. 133; *City of London v. Riggs*, 13 Ch. D. 798; *Midland Ry. Co. v. Miles*, 33 Ch. D. at p. 644.

(*n*) *Holmes v. Goring*, 2 Bing. 76.

(*o*) *Dixon v. Cross*, 4 Ont. R. 465.

(*p*) *City of London v. Riggs*, 13 Ch. D. 798; *Holmes v. Goring*, 2 Bing. 75; *Davis v. Sear*, 7 Eq. 427; *Turnbull v. Merriam*, 14 U. C. R. 265.

grant is alleged to arise. In *Wheeldon v. Burrows* (*q*), Lord Justice Thesiger said, "it no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dalton v. Taylor* (*r*), that it was for the public good, as otherwise the close surrounding would not be capable of cultivation." This does not seem to be the true reason, otherwise the way would have been held to exist in the case of escheated land, and the contrary is held (*s*). It seems to proceed upon the maxim that a man shall not derogate from his own grant, i.e., he shall not grant a land-locked parcel and deny the right to get to it and so render his grant ineffective. And we have seen that a man cannot by his own act, as by building up, create for himself a necessity to use another's land (*t*). And an examination of the authorities upon which the modern cases proceed will show that they do not support the doctrine. Where strict pleading is required, a right of way claimed by the grantor of the surrounding land should be pleaded as a re-grant (*u*). Such a way is neither the subject of an exception nor a reservation. The former being of a part of the thing granted, and the latter being properly applicable to something not *in esse* but newly created out of the thing granted (*v*).

Way by prescription.—"In the case of proving a right by prescription the user of the right is the only evidence. In the case of a grant the language of the instrument can be referred to, and it is, of course, for the Court to construe that language" (*w*). In the case of a grant, if there is no

(*q*) 12 Ch. D. at p. 58.

(*r*) 2 Lutw. 1487.

(*s*) Ante, p. 278.

(*t*) Ante, p. 278; see also *Pomfret v. Ricroft*, 1 Wms. Saund. 323 a, Sergeant Williams' note.

(*u*) *City of London v. Riggs*, 13 Ch. D. 798.

(*v*) *Shep. Touch.* 77; *Co. Litt.* 143 a; *ibid.* 47 a. See *Wilson v. Gilmer*, 46 U. C. R. 545.

(*w*) *Williams v. James*, L. R. 2 C. P. at p. 581.

clear indication of the intention of the parties, the grant is to be taken most strongly against the grantor. At the same time, as an easement is a restriction of the rights of property in the servient tenement, the owner of it is not to be burdened with greater inconvenience than his grant warrants. In the case of a way by prescription the evidence of user is the only evidence of the right, and the extent of the user is the measure of the extent of the right. It would seem, therefore, that as there is no grant to be construed, the servient tenement ought not to bear a greater burden than the accustomed user warrants. Consequently, a right of way of one kind acquired by prescription does not necessarily include a right of another kind. In *Ballard v. Dyson* (x), *Chambre, J.*, pointed out that it would be necessary to drive every species of cattle over a way in order to preserve the right of passing with every species of cattle. It is necessary, as *Parke, B.*, said, in *Cowling v. Higginson* (y), to generalize to some extent, otherwise the use of the way would be confined to the identical carriages or cattle that had been driven over it. But, on the other hand, it must be borne in mind that while a user under a grant is a user as of right, and the grantor must not be allowed to belittle his grant, a user by prescription is always, until the right is established by the prescription, a user against the right of the owner of the servient tenement. By a modified user for the necessary length of time the prescriptive owner should not be allowed to claim a greater right or inflict a greater burden on the servient tenement than his user would warrant. And the effect of a trespass is never extended in favour of the trespasser beyond the actual fact. It was held in *Ballard v. Dyson* by the majority of the Court that evidence of a right of way for carriages did not necessarily prove a right of way for cattle. So, proof of user of a way for agricultural purposes will not establish a right of way for mining, or for all purposes (z); nor will a right of way for the

(x) 1 Taunt. 279.

(y) 4 M. & W. 245.

(z) *Cowling v. Higginson*, 4 M. & W. 245; *Bradburn v. Morris*, 3 Ch. D. 812; *Wimbledon v. Dixon*, 1 Ch. D. 862.

purpose of carting timber include a right of way for all purposes (*a*). It would be manifestly unfair to increase the burden in some instances, and the situation of and use to which the property is put might have a material effect upon the right. Lord Abinger pointed out that if the road lay through a park the jury might naturally infer the right to be limited; but if it went over a common they might infer a right for all purposes (*b*). In a locality where private residences of a superior class were situated, an owner might well submit to the acquisition by his neighbour of a right to drive a private carriage in and out over his land; but should a business, requiring the use of a large number of heavy drays, be established after the right to drive a carriage had been acquired, it would materially increase the burden on his land and depreciate his tenement to a large extent.

If a highway be impassable from want of repair the public may deviate therefrom and pass over the adjoining land (*c*). But where a way was dedicated subject to the right of the proprietor, through whose land it passed, to plough it up when ploughing his land, it was held that there was no right to deviate from the way when it became impassable on account of the ploughing (*d*).

The grantee of a private way is at common law bound to keep it in repair, and so when it falls into disrepair he has no right to deviate (*e*).

(*a*) *Higham v. Rabett*, 5 Bing. N. C. 622.

(*b*) *Cowling v. Higginson*, 4 M. & W. at p. 252.

(*c*) *Carriok v. Johnston*, 26 U. C. R. 65. As to roads incumbered with accumulations of snow and rights and duties of adjoining proprietors, see R. S. O. c. 198.

(*d*) *Arnold v. Holbrook*, L. R. 8 Q. B. 96.

(*e*) *Pomfret v. Ricroft*, 1 Wms. Saund. 322 c. n. 3. A grantee complained of the bad condition of the road, and asked what remedy he had if he was not allowed to go out of the prescribed line of road. He was told long ago by Mr. Justice Suit, that, "if he went that way before in his shoes, he might now pluck on his boots:" *Dike v. Dunston*, Godb. 53; *Bullard v. Harrison*, 4 M. & S. 387; *Ingram v. Morecraft*, 33 Beav. 49.

EDITORIAL REVIEW.

Carriers' Liability for Luggage.

A good deal of comment was made upon the case of *Meux v. G. E. R. Co.*, when it was decided by Mr. Justice Mathew that the defendants were not liable for negligently destroying the livery of the plaintiff's footman, who was a passenger on their railway. The footman could not recover because the livery belonged to his mistress, the plaintiff, and the plaintiff could not recover because the contract of carriage was with the footman alone.

The Court of Appeal has reversed the decision of the Judge of first instance on what appear to be very sensible grounds. That such a dilemma as that stated could exist would certainly be an anomaly.

The Court agree that there was no contract with the plaintiff, though, if the servant had been carrying the luggage of his employer the latter might, as an undisclosed principal, have adopted the contract. In the case in question Mr. Justice Mathew held that the luggage was not the personal luggage of the footman, and that it was not lawfully on the defendants' premises. Under such circumstances the livery, if worn by the servant, could not have been recovered for if injured, for the reason that it was not lawfully on the railway; and the only way of removing such effects from one place to another with safety would be for the master himself to take them.

Lord Esher said that the master, under the circumstances of this case, could sue apart altogether from the contract. "If there is a mere omission by the company to carry the goods, only the servant can sue, because he gets the right to sue from the contract alone. There was no

duty on the part of the company in this case to Lady Meux to take reasonable care not to omit to do anything as regards this luggage. But is there not a right to sue any person who has goods put into his possession and who deals with them negligently to their injury? . . . If luggage is put openly on the platform of a railway station, so that the company knows it is there, it must be a wrongful act for the company to do anything towards it which is negligent. Suppose the company instructed its servant to throw the luggage from the platform on to the line, would not that be a wrongful act? If the company deal with the luggage at all, it must be with sufficient care not to injure it." And again, "In an action for a nonfeasance there must be a contract between the plaintiff and the defendant. A misfeasance does not depend upon contract at all; it is actionable independently of contract. If the defendant has so dealt with another person's property as to injure it, an action lies, although there is no contract." Lord Justice Kay said, in dealing with the question whether the company could have refused to carry the luggage, "Here the servant was the bailee of the livery; and it was as much the personal luggage of the passenger as anything could possibly be. The company could not have refused to carry the livery; and it was, therefore, lawfully on their premises."

Lord Justice A. L. Smith thought that the footman could have sued the company either in contract or in tort and that Lady Meux could sue them in tort as the goods were damaged whilst lawfully on the premises of the defendants.

What is a Building?

In *Lavy v. London County Council*, 14 Rep. Oct. 216, the Court of Appeal in England had to determine what was a "building, structure or erection." The structure in question was a wall 18 inches thick and 11 feet high, intended amongst other things to be used as a screen for advertisements. The question arose under an Act which de-

clared that "no building, structure or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, etc." The purpose of the enactment was looked to. "Of course," said Lindley, L. J., "in one sense every wall, everything erected, is a building, structure or erection"; but of course that section must be construed reasonably, and with reference to the object for which it is passed. . . . We must look at this case and not at the effect of other cases. We must ask ourselves as men of the world, whether such a new wall as this is not a 'building, structure or erection' within the mischief of section 75 (2). I have not the slightest hesitation whatever in saying that I think it is. I do not hesitate to say that I think repairing an old dwarf wall and putting on new rails instead of the old ones, if worn out, would not be an infringement of the section; but this is an entire structure or building of a totally different character from what was there before, and for a totally different purpose, and it is merely an attempt to throw dust in the eyes of the Court to say that this is only a boundary wall."

Appeal Books a Nuisance.

In view of recent legislation abolishing the practice of printing appeal books, it is interesting to notice that in the Digest of Volume 21 of the Appeal Reports we find the following:—"Appeal Book. See Nuisance."

Sunday Golf.

A case doubly interesting to lawyers, for its personal effect as well as for its legal import, is Judge McDougall's decision that it is not illegal to play golf on Sunday. His Honour heard the case at the Sessions on an appeal from the conviction of a magistrate. The evidence showed that it is not a noisy game. In fact, it is, apart from the sharp tap or click of the clubs upon the ball, an exceedingly silent game. It is part of the strict etiquette of the game that while a player is addressing his ball absolute silence

shall prevail. All the evidence was strictly to this effect. The prosecution, however, relied on its being a game "of ball." The statute in question specifies several well-known games, such as football and rackets, and includes "other noisy games of ball." His Honour held that such other games must be games of a like kind with those specifically mentioned, which were of a noisy and boisterous nature. And as golf in no way resembled them, but was a quiet game, it did not fall within the statute.

We notice that a conclave of very estimable ladies, who may be described as social reformers, resolved, that they had "read with pain" the judgment of His Honour, published in the newspapers, and resolved further that "the learned counsel" (a trite but inapplicable phrase) should in his lofty position have felt it his duty to administer the "laws of God rather than the laws of man." Not that they disagree with the decision, which they rather seem to agree with on legal grounds, as they speak of the loophole in the law, and condemn him for administering the human law, which does not forbid the game. But their desire is evidently for an Ecclesiastical Court, with the right theological views.

We do not wish to be understood as advocating Sunday games. Those who play on Sunday must settle the matter for themselves. But Sunday observance is sometimes carried to an absurd extent—and by well-meaning people too.

Right to Search Prisoners.

The charge of Mr. Justice Falconbridge to the jury in the recent case of *Gordon v. Stephen*, having been taken too broadly, his Lordship has prepared the following memorandum, which, in addition to removing any misconception as to the charge in that case, will be found to be of general interest on the subject: "That portion of my charge to the jury in the recently tried case of *Gordon v. Stephen*, which dealt with the right of an officer to search a prisoner, has been much quoted, and is possibly capable

of generalization to an extent which would be inimical to the efficiency of the police and to the interests of justice. My remarks applied to the circumstances of the particular case, and were only illustrating the principle that there is no law rendering a person whose presence is required as a witness, and who has been arrested on that ground alone, liable to the regulations of a police office as a criminal. The right of an officer to search the person of one arrested for felony has always been assumed, as well as the right to keep the goods found on him if necessary for the purposes of the trial. See Tomlin's Law Dictionary, sub. tit. Constable, iv., 'A constable must keep goods found on a felon till trial, and then return them according to the directions of the Court.' In the interesting case of *Dillon v. O'Brien*, reported in 16 Cox, C. C., at page 245, the Irish Exchequer Division extended the rule to cases of misdemeanour; the distinction is now of course immaterial. Palles, C.B., says, 'If, then, the right here claimed does not exist, even in treason and felony, it would follow upon the arrest of a murderer caught in the act, and on the moment lawfully arrested, whilst the weapon with which the crime had been committed was in his hand, it would be illegal for the constable to detain that weapon for the purpose of evidence; so also would it be illegal for the officers of the law to take possession of poisons found in the possession of one who had caused death by poison, and even in treason, letters from co-traitors evidencing the common treasonable design, found in the possession of a traitor, would be safe from capture upon his arrest, although from the earliest times it has been the settled and unvarying practice to seize such proofs of guilt, and give them in evidence at the trial.' The case of *Leigh v. Cole*, 6 Cox C. C. 329 (cited with approbation by our Court of Appeal in *Gordon v. Denison*, 22 A. R. p. 326), was a charge to a jury by Mr. Justice Vaughan Williams on the subject of the right of constables to search and handcuff persons in custody for breaches of the peace, and the learned Judge made use of the following language:—'With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct

himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend on all the circumstances of the case.' This is practically what I told the jury in *Gordon v. Stephen*. In the case then of persons in custody not accused of an indictable offence it would appear that no general rule can be applied, and that it would always be for a jury to say whether the case is one in which a search should have been made. In the very case tried by Vaughan Williams, J., the jury found for the defendant. I am further reported to have said something which would reflect on the administration of the Police Commissioners of their office. Nothing was further from my intention. Counsel for the plaintiff had argued that it was necessary to give exemplary damages to prevent other citizens from being treated as Gordon was. To prevent that argument having an undue effect on the minds of the jury, I told them that I did not suppose, in view of the expression of the law which the highest Court in the province had given on the question of searching, that any citizen in Gordon's position would ever be subjected to a like indignity."

Liability of Bailee of a Dog.

An interesting case, *Beacock v. White*, arising out of the loan of a dog, was recently tried by Judge Reynolds in the first Division Court of Leeds and Grenville, and turned on the liability of a gratuitous borrower.

The plaintiff was the owner of a dog, an Irish retriever, which the defendant, a resident of Brockville, who was going out camping near Westport, borrowed from

the plaintiff, alleging that he wanted him as a companion in his camp. The defendant took the dog with him to the station of the Brockville and Westport Railway, but the dog made his escape and ran home. On reaching Westport the defendant sent a message to the plaintiff asking him to send out the dog by one of the trainmen. The dog was so sent to, and received by, the defendant. This was in the month of May last. Some time afterwards the plaintiff wrote a postcard to the defendant asking him to return the dog. The defendant received the postcard but paid no attention to it, thinking, as he alleged, that the dog would be of no use to the plaintiff, and feeling that he himself wanted him. Later on, about the 24th June, the defendant had occasion to leave his camp and return to Brockville for a few days, and he then left the dog with his brother-in-law, one William Rorison, at or near Westport, to be taken care of till his return.

Rorison said the dog was very cross, and that he had to arm himself with a club when he wanted to approach him. He chained the dog to a post in an outhouse, where he had for 18 years past always kept his own dogs. The dog howled and made a great noise, though he was supplied with food and water regularly. One afternoon Rorison's wife remarked to him on his coming home that she had not heard any noise from the dog for some hours. Rorison went to see if the dog had got away or what was the matter, and he then found that the dog had twisted the chain around his neck and had choked to death. Rorison stated that the chain by which the dog was fastened had a proper swivel on it, and that he had used the dog as he would have used one of his own.

When the defendant returned to Westport, he learned that the dog had choked to death.

The plaintiff brought the action to recover the value of the dog, and put the value at \$25.

William Brownlow, a well-known breeder of dogs, and therefore an expert, said the dog was a thoroughbred Irish retriever, and was worth \$50.

The defendant and his brother-in-law said the dog was of no particular value.

Mr. Deacon, Q.C., for plaintiff, cited *Coggs v. Bernard*, 2 Raym. 909; *Smith's Leading Cases*, vol. 1; *Wilson v. Brett*, 11 M. & W. 115.

Mr. Marshall, for defendant, cited *Addison on Contracts*, American edition (1888), 515, *et seq.*

Judgment:—The facts are stated above. This was a bailment for the bailee's sole benefit—known to the Roman law as *commodatum*—a gratuitous loan for use, and contemplates the specific return or delivery over of the thing loaned. The borrower is bound to exercise the highest degree of diligence known to the law, because he is the sole person deriving any benefit from the bailment, and he is liable for even the slight negligence. 1 Sm. L. C. (Boston edition of 1888) 409, 410. The rights of the borrower are strictly confined to the use actually or impliedly agreed to by the lender and cannot be lawfully exceeded, and the borrower by any excess will make himself responsible. "A gratuitous loan is to be considered as strictly personal, unless from other circumstances a different intention may fairly be presumed. Thus, if A. lends B. her jewels to wear, this will not authorize B. to lend them to C. to wear; so if C. lends D. his horse to ride to Boston, this will not authorize D. to allow E. to ride the horse to Boston." *Story on Bailments*, 197. In *Addison on Contracts*, vol. 1, Boston edition, 1888, page 352, it is laid down that "when the loan is made by way of *commodatum* the borrower must return the specific thing lent within a reasonable period after request, and if he neglects so to do he is responsible for all accidents that afterwards happen to it."

In this case the defendant received a postcard from the plaintiff asking him to return the dog; but both then and afterwards, when he himself was going into Brockville, where he got the dog and where the plaintiff lived, and when he could then have taken the dog with him and returned him to the plaintiff, he refused or neglected to do so.

The loan to the defendant being strictly personal, he was bound to surrender the dog to the plaintiff within a reasonable time after the request; and, moreover, he could not properly hand over the possession of the dog to a third party, as he did when leaving him with Rorison, who chained him up. Whether the death of the dog resulted from carelessness or accident, the defendant had rendered himself responsible for it, and must pay the damage resulting therefrom. From the evidence, the plaintiff's claim—\$25—is not unreasonable, and I think he should have judgment therefor, with costs of suit.

The Unprofessional Conveyancer.

This ever-recurring subject is again brought to our notice by some characteristic advertisements. A correspondent makes the insinuation that the conveyancer who lets sheep "to double" is really after parchment for his conveyancing. This is the advertisement: "—. —. ———, Issuer of Marriage Licenses, Commissioner in H. C. J., and General Conveyancer, Fire and Life Insurance Agent, respectfully solicits a call from parties having Deeds, Mortgages and Chattel Mortgages requiring Execution, Assignment of Mortgage, or discharge of same, Leases, Wills, Business Letters, &c. First-class Law Counsel obtainable on short notice when required. Loans money on City, Town, Village and Farm Properties at low rates of interest. Correspondence solicited from all wanting money in large or small sums. Enclose stamp for reply. Sheep to let to double. Address Lock Box 103, ———, ———, Ont."

Here is another one whose attainments are not quite so varied. His name appears in the list of Division Court Clerks, but there is no record of his practising in his own Court:—"Money to Loan at lowest rates on Land Security. Wills, Deeds, Mortgages, Leases and Legal Work accurately got up, and in such a way that you will not be afraid to extend your patronage to the same man afterwards. My office is now at ———'s Hardware Store, where all old and

new clients will be welcome. —. ———, Notary Public, &c."

The subject has its serious, as well as its comical, side. The Legislature requires of the professional man a severe course of study, and precludes him from engaging in other occupations. But after exacting this from him, as a condition of his being admitted to practise his profession, it permits every man who pleases to do conveyancing and to practise in the Division Courts. Every other profession is safeguarded and protected. Not only is it a matter of concern for the profession, but it is of importance to the public. It is frequently the duty of the Courts to point out to suitors how the expenditure of a small but reasonable sum of money for professional advice or assistance would have saved expensive litigation, and perhaps loss of rights, which occur through the ignorance of cheap lay-lawyers employed to do work which they did not understand.

THE CANADIAN LAW TIMES.

DECEMBER, 1895.

MALICIOUS CORPORATIONS.

IF this caption proves in any way astonishing to lawyers of the old school, who may possibly consider it a misnomer, it is not ill-chosen, and indeed the object in writing is assisted if the name serves to call attention to the somewhat surprising fact that it has never yet been determined by the higher Courts of England or Canada, that a corporation can possess that undesirable attribute of human imperfection called "malice."

The recent case of *Nevill v. Fine Arts, etc., Insurance Co. (a)*, before the Court of Appeal, accentuates this fact, and the Court, composed of Lord Esher, M.R., and Lopes and Rigby, L.JJ., in delivering judgment in that case, shewed unmistakable anxiety to avoid deciding the question, the Lord Justice Rigby saying, "Upon the other question as to whether a corporation can be liable where it is necessary to prove actual malice, I desire to leave the case without the slightest intimation one way or another as to the inclination of my mind with regard to it."

In view of the vast and ever-increasing number of corporations doing business in various trades and spheres which was formerly confined to individuals, and also in view of the apparent increase in the number of actions brought for malicious prosecution and libel, it may be useful to discuss shortly the decisions on the subject.

(a) L. R. (1895) 2 Q. B. 156, and 14 R. 169.

To old school-men the idea that a corporation aggregate can possess a conscience and a moral sense is quite distasteful. And to those who depended for their legal nourishment upon Coke and Blackstone, there is every excuse for clinging to the opinion that a corporation is soulless and unemotional, unable on the one hand to indulge in generous and sympathetic impulses, or on the other to cherish hatred, malice or all or any uncharitableness. Lord Coke says (b): "A corporation cannot treason nor be outlawed or excommunicate, for they have no souls, neither can they appear in person but by attorney. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person nor swear; it is not subject to imbecilities, death of the natural body, and divers other cases." This doctrine, strengthened and extended by the judgments and opinions of eminent lawyers who moulded the legal thought of their day, continued to be the belief for a great length of time. Perhaps one of the first cases where the doctrine was attempted to be displaced was in *Rex v. The City of London* (c), where it was held that the mayor and aldermen were guilty of treason in publishing defamatory matter concerning their Lord the King (Charles II.) Considering the stormy nature of the times, this decision, however, may possibly have been due more to political causes than to sound judicial determination, and it was apparently esteemed but little by later Judges. Even so, the decision shews a vague apprehension of the belief which in modern times has broadened so as to be quite irresistible, that for ordinary torts and wrongs committed, corporations are as morally and legally liable as if the wrong-doing was that of the individuals of whom they are composed.

The law is now supposed to be as clear as the sun at midday that, generally speaking, corporations are as responsible for wrongful acts of commission and omission by themselves or their servants and agents, within the scope of their powers and authority, as are individuals.

(b) *Suttons Hospital Case*, 10 Co. Rep. 32b.

(c) 8 How. St. Tr. 1039 (1683).

But whether this is true when a necessary ingredient of the act committed is a motive or a particular condition of the mind of the wrong-doer is the point here proposed to be discussed; and in doing so, it may be convenient for the sake of clearness to state several definitions, even at the risk of boring learned readers to whom they must be perfectly familiar.

What is malice in the ordinary acceptation of the word by lawyers, and what is "actual" or "express" malice?

The definition of "legal" malice by Bayley, J., in *Bromage v. Prosser* (*d*), has been often accepted by the highest Courts. He defined it as "a wrongful act done intentionally without just cause or excuse." Many a wrongful act, however, is done without the emotional part of a man's nature being called into play in the least. A trader may fraudulently work on the ignorance and credulity of a savage with whom he is bartering, and yet have a sincere pity for the state of his victim, and be a large contributor to foreign missions. There must therefore be considered the malice called "actual" or "express." This is "Any corrupt or wrong motive or personal spite or ill-will" (*e*), "Any corrupt motive, any wrong motive or any departure from duty" (*f*), or "Not only spite, but any other indirect motive other than a sense of duty" (*g*).

Starting with these definitions, there must be considered the decisions in the case where actual malice is an ingredient, and without proof of which the aggrieved party cannot succeed in maintaining his action. These chiefly are actions of—

(1) Malicious prosecution.

(2) Privileged defamation, as it is commonly called, but more properly speaking cases where the defamatory words are published or uttered on an occasion which is privileged.

(*d*) 4 B. & C. 255 (1825).

(*e*) Fraser on Libel, 138 (1893).

(*f*) Erle, C. J., in *Turnbull v. Bird*, 2 F. & F. 524 (1861).

(*g*) Lord Campbell, C. J., in *Dickson v. Earl of Wilton*, 1 F. & F. 419 (1859).

Again resorting to definitions, the opinion of Lord Wensleydale in *Toogood v. Spyring* (*h*), may be quoted: "The law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency made such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

The question of privileged occasion is of great practical importance in connection with the onus of proof. If the occasion is privileged, the plaintiff must prove malice in fact. The determination as to whether it is privileged rests wholly with the Judge, and the moment he rules that it is, the burden of shewing that the defendant did not act in respect of the reason for the privilege but for some other and indirect reason is thrown upon the plaintiff (*i*). In the case just cited the present Master of the Rolls said, "If the occasion is privileged, it is for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he has an indirect and wrong motive. If the indirect and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. So if it be proved that, out of anger or for some other wrong motive, the defendant has stated as true that

(*h*) 1 C. M. & R. 181 (1834).

(*i*) *Clark v. Molyneux*, L. R. 3 Q. B. D. 237 (1877).

which he does not know to be true, and he has stated it whether it be true or not, recklessly by reason of his anger, or other motive, the jury may infer that he used the occasion not for the reason which justifies it but for the gratification of his anger, or some other indirect motive."

To what he said in *Clark v. Molyneux*, Lord Esher added in *Royal Aquarium, etc., v. Parkinson* (*j*), where the defamatory words were uttered when the question of licensing a music hall came before the London County Council. The defamatory remarks were made during a debate, and the Court held that the words were used on a privileged occasion. The Court went on to say, "If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion. It has been said that anger would be such a state of the mind; but I think that gross and unreasoning prejudice not only with regard to particular people, but with regard to a subject matter in question, would have the same effect." See also *Hanes v. Burnham* (*jj*).

This reference to cases on privileged libel is somewhat of a digression, and is only made here to shew the importance of being able to answer the question: Can a corporation—say, a newspaper publishing company—be guilty of "anger" and "gross and unreasoning prejudice" so as to enable it to be dragged from the vantage ground of "privilege" in an action of libel?

Malice as actuating both a libel and an unwarranted prosecution in the Criminal Courts is, without considering refined or casuistical objections, the same thing. We suppose there is no doubt of that. The reasoning then will apply to either class of case, whether malicious prosecution or libel.

(*j*) (1892) 1 Q. B. 431.

(*jj*) 26 O. R. 528.

We have already stated the expressed disinclination of the Judges of the Court of Appeal in *Nevill v. Fine Arts, etc., Co.* in this year of 1895 to decide the point. So it may be fairly said that opinions on the question at the present day are nebulous, and a glance at the cases shews that this remarkable uncertainty, induced by reason of a case never having come up squarely for decision, is quite accounted for.

By far the most vigorous and dogmatic deliverance on the subject is that given by Lord Bramwell in *Abrath v. N. E. Ry. Co.* (k). In this well-known case, it may be remembered that the railway company commenced a prosecution against Dr. Abrath for conspiracy to defraud, by pretending injuries to a passenger through an accident, so that damages were recovered. Lord Bramwell in his speech almost wholly ignored the points on which the majority of the Court decided the appeal, and said, "My lords, I am of opinion that no action for a malicious prosecution will lie against a corporation. I take this opportunity of saying this as directly and peremptorily as I possibly can; and I think the reason is demonstrative. To maintain an action, it must be shewn that there was an absence of reasonable and probable cause, and that there was malice or some other indirect and illegitimate motive in the prosecution. A corporation is incapable of malice or of motive. If the directors even by resolution at their board, or by order under the common seal of the company (I am putting the case plainly in order that there may be no mistake about it), were maliciously, with a view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive, no action would lie against the corporation, because the act of the directors would be *ultra vires*; they would have no authority to bind the company by ordering a malicious prosecution. It may be said, 'Well, but this is rather hard upon the man who has been prosecuted and improperly

(k) 11 A. C. 247 (1886).

prosecuted.' That is to say, the corporation is innocent but its officers are guilty. But the same thing happens in the case of an individual prosecutor. A man receives false information: he prosecutes upon that information. The person who gives him the information is not liable because he did not prosecute. . . . It is said that this is an old-fashioned notion. It is, but this opinion is one that I have entertained ever since I knew anything about the law, and though it is an old-fashioned one, I trust it is one that will not die out for the reason which I have given."

Baron Pollock, who was the Judge at the trial of *Nevill v. Fine Arts, etc., Co.*, makes a curious error in his judgment where he says that it was decided (*sic*) in *Abrath v. North Eastern* that an action of malicious prosecution would not lie against a corporation. Because, despite the strength of Lord Bramwell's dictum, and after that learned lord had concluded his speech, the Earl of Selborne rejoined, "The importance of that question would certainly have led me, before I could have arrived satisfactorily at an opinion of my own upon it, to desire to hear it argued. It has not been argued at your lordships' bar. . . . I do not think that your lordships' decision in the present case can properly be regarded as determining that question."

It has never been argued to this day in any other case, and the assertion made at first, that the question is an open one in so far, at any rate, as the two highest Courts in the realm are concerned, is thus warranted.

The question had come up, and been passed upon in the affirmative in some cases, however, in England long before the judgment in *Abrath v. North Eastern*, but the weight of judicial authority is not by any means sufficient to displace the uncertainty mentioned.

Henderson v. Midland Ry. Co. (1) was an action of malicious prosecution on a charge of theft from the company's premises, and the setting aside of the nonsuit there is frequently quoted by those who support the right to bring an action of malicious prosecution against a com-

(1) 20 W. R. 23 (1871).

pany, and by text books, as an authority in favour of this contention. But an examination of the case shews that such an objection was not taken at the trial, and Kelly, C.B., and Cleasby, B., purposely refrain from discussing it in banc; while Bramwell, B., dissenting, even then imbued with the ideas many years afterwards presented in *Abrath v. North Eastern Ry.*, expressly held that no such action would lie.

A stronger opinion in favour of the right of action is that of Fry, J., in *Edwards v. Midland Ry. Co.* (*m*), which was also an action for malicious prosecution on the ground of theft. Fry, J., refers to his judgment as one of rehearsal, as the case was to go higher; but it seems never to have gone to appeal. The decision in this case is founded on that of Lord Campbell, C.J., in *Whitfield v. South Eastern Ry. Co.* (*n*), holding that an action of libel would lie against a corporation aggregate. But it is to be noted that this was not a case of privileged libel. In *Edwards v. Midland Ry.*, Fry, J., also expressly overrules, or rather dissents from the judgment of Alderson, B., in *Stephen v. Midland Ry.* (*o*), where that Judge held that the action could not be maintained against a corporation. Although in the same case Platt, B., in setting aside the verdict on other grounds, expresses the opinion that the argument that the action will not lie, is a very weak one.

Fry, J., also approves of the decision in *Green v. London General Omnibus Co.* (*p*), where the plaintiff declared that the defendants had "wrongfully, vexatiously and maliciously" trespassed upon the carriages of the plaintiff and otherwise interfered with his business. On the objection that the company could not be guilty of such a wrong, based as it was on a motive, Erle, C.J., says, "The doctrine that a corporation having no soul cannot be actuated by a malicious intention is more quaint than substantial." It may be remarked, however, that the wrong

(*m*) 6 Q. B. D. 287 (1880.)

(*n*) E. B. & E. 122 (1860.)

(*o*) 10 Ex. 352 (1854.)

(*p*) 7 C. B. N. S. 290 (1859.)

doing here was directly for the supposed benefit of the defendants' own business and for the purpose of harassing a rival.

In the case in our own Courts of *McLay v. County of Bruce* (*q*), Wilson, C.J., held a municipal corporation liable in an action of libel, and relied chiefly on the authorities lastly mentioned. But he distinguished and got away from the judgment of Lord Bramwell, in *Abrath v. North Eastern*, by pointing out that the libel complained of might not be privileged, and that the municipality was directly interested in publishing it, as it was already in litigation with the plaintiff over the subject matter contained in the publication. The Chief Justice, however, virtually conceded that if the occasion should at the trial turn out to be privileged, the action would not lie, as proof of actual malice could not then be admitted. As this was a case of demurrer to the plaintiff's carelessly drawn pleadings, it cannot be regarded as decisive; but it is to be remembered that the plaintiff at the trial was nonsuited by MacMahon, J.

The result of investigation, therefore, is that so far as English and Canadian reported cases are concerned, it cannot be said with certainty that a corporation can be guilty of actual malice, and therefore an action against a corporation in which that quality of the mind is required to be proved should, on the weight of present authority, fail.

That such should be the case is not only surprising but anomalous. The theory is founded on a fiction; and gives ground for the allegation often made by laymen and the unlearned, that the law in many places is rusty and inexpansive, and not concurrent with or adaptable to the conditions of business and the social life of an energetic and progressive people. Take a case with which we are all, more or less, familiar. A business man forms a limited company composed of his wife, who holds the majority of shares, himself, his brother and his chief clerks. The company takes over the business of the individual, and he or his clerk, as a member of the company, libels a public

(*q*) 14 O. R. 898 (1887).

officer, such as an officer of customs or an inspector, or maliciously prosecutes a rival dealer. The motive prompting the wrongful act may be most vindictive and the result to the injured person disastrous. Is the company, forsooth, to be exempt from liability and the remedy of the injured man confined to damages against an individual who may be proof against the sheriff? It is not desired here further to impress a personal view of what the law should be. That object can be served by a reference to the United States cases, which will shew that distinctions there between corporations and individuals have been swept away, and that fraudulent and malicious intent of a corporation can be proved by shewing the fraud and malice of its servants and authorized agents.

Mr. Spelling, of San Francisco, in his work on Corporations (1892) says, "The disputed points seem to have been the difficulty of attributing to a soulless, emotionless entity the quality of malice necessary to be imputed in libel and other injuries to character. But the great and ever-increasing number of corporations assuming all the functions of individuals, has created a tendency, strongly manifested in the modern decisions, to assimilate as far as possible the rights and duties of corporations to those of natural bodies."

Newell on Malicious Prosecution, 382, may also be quoted: "The days of Lord Coke and Sir William Blackstone have passed away. Had they lived in the closing days of the nineteenth century, they would undoubtedly have seen something besides their imaginary soulless concerns in the gigantic corporations of this age. The venerable absurdity on which their views were founded has been suspended by an enlightened modern doctrine. A corporation is now held liable for an injury done by one of its employees or servants in the same manner and to the same extent as natural persons are liable under like circumstances."

Goodspeed v. East Haddam Bank (r), is one of the oldest authorities in the United States. It was there held

(r) 22 Conn. 530 (1854).

that an action of malicious prosecution would lie against a corporation, and Curtis, C.J., says, "The interest of the community and the policy of the law demand that corporations should be divested of every feature of a fictitious nature which shall except them from the ordinary disabilities of natural persons for acts or injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an exact protection for all their rights and privileges and no more."

Williams v. Planters Ins. Co. (s), was an action (amongst other counts) against defendant corporation for falsely, maliciously and without probable cause, causing the plaintiff to be indicted for arson. The company demurred. The opinion of the Court was delivered by Campbell, J. "The real question of substance presented by the demurrer is whether a corporation aggregate is liable to an action for malicious prosecution. The old doctrine was that a corporation was not so liable because malice is the gist of the action, and it was said that malice could not be imputed to a mere legal entity, which having no mind could have no malice; and this narrow view still prevails to some extent. But the steady process of judicial evolution has led to the establishment of the just doctrine of the civil responsibility of a corporation for the acts of the sentient persons who represent it and through whom it acts, and of the liability of a corporation for the acts of its agents under the conditions that attach to individuals."

Boogher v. The Life Association of America (t), is in line with this, and follows *Fenton v. Wilson Sewing Machine Co.* (u), in which it was held that an action against a corporation would lie, and that it was not necessary to shew an express authority from the corporation to its agents to institute and carry on the prosecution, but that it is sufficient to shew that the proceedings were instituted

(s) 57 Miss. 759 (Sup. Court), (1880).

(t) 75 Mo. 819 (Sup. Court), (1881).

(u) 9 Phila. 189.

by agents of the corporation in its interest, and for its benefit, and that they acted within the scope of their authority. This latter case approves of the judgment in *Cumberland Valley R. R. v. Baab* (v), where it says, "A corporation in all cases within the scope of its legitimate functions may act as a natural person may act, and the rule of corporate responsibility has kept even pace with the growth of their powers, and the enlargement of their spheres of action, not only to the enforcement of contracts but also in making them amenable to personal actions for torts. Had this not been so, their existence would have become an evil too intolerable to be borne."

In *Reed v. Home Savings Bank* (w), Lord, J., says, "It is too late to discuss the question once much debated, whether a corporation can commit a trespass, or be subject generally to actions of tort, as individuals are. It was contended at the argument that an action for malicious prosecution so differs from other actions that it cannot be maintained against a corporation; but although in order to maintain such an action both malice and reasonable and probable cause must be found, yet proof of want of probable cause will warrant the jury in inferring malice. And by the great weight of modern authority, a corporation may be liable even when a fraudulent or malicious intent in fact is necessary to be proved; the fraud or malice of its authorized agents being imputable to the corporation."

Many other American authorities could be quoted to the same effect.

Should the law have to be pronounced upon in our Courts before it comes up for decision in England, it is to be hoped there will be no hesitancy in following the reasoning of the Courts to the south of us.

H. M. MOWAT.

(v) 9 Watts 418 (1839).

(w) 130 Mass. 443 (1881).

EDITORIAL REVIEW

Inchoate Easements and Injunction.

An illustration of the use of an injunction, in apparent antagonism to the opinion of the Court as to the plaintiff's right to maintain the action, would appear to be afforded by the case of *Battersea v. Commissioners of Sewers for London*, L. R. (1895) 2 Ch. 708, but for the report of the case in 13 R. Nov. 139.

The facts, as stated in the former report, are as follows: The plaintiff was lessee for eighty-two years of Weavers' Hall. The defendants were proceeding to build offices opposite the plaintiff's building, on a site formerly occupied by four houses which had been pulled down in 1875—one of them in May, the others in October of that year. The space had in the meantime been occupied by houses of low elevation. The writ was issued on 16th July, 1895, for an injunction to restrain the defendants from building so as to interfere with access of light to the plaintiff's building. On an application for an interlocutory injunction, it was argued that, as nineteen years had elapsed since the buildings had been pulled down, nothing that the defendants could do would defeat the plaintiff's right, for there could be no interruption for a year before the remainder of the twenty years had expired; and as the plaintiff's inchoate right, which would in less than a year ripen into a consummate right, could not be defeated, it should be protected, in the meantime by injunction. The learned Judge (North, J.) who heard the motion, thought that the action would not lie until the plaintiff's right was complete, but granted an injunction to restrain the defendants from building higher than the buildings existing in July, 1875. As to the right of the plaintiff, his Lordship said: "Under the 3rd section of the Act, taken alone, an

action cannot be brought in respect of a prescriptive right to light unless the access and use of light has been actually enjoyed for the full period of twenty years without interruption; and in that case the right is to be deemed absolute and indefeasible. . . . Section 4 says: 'Each of the respective periods of years'—"that is the twenty years in this case"—'shall be deemed and taken to be the period next before some suit or action, etc.' That section, to my mind, strongly bears out, on this point, what s. 3 says, because the period of years—the twenty years—is to be 'next before the suit or action wherein the claim is made.' What I am asked to do now is to say that it is quite sufficient that the twenty years shall be calculated, not twenty complete years before action, but twenty years, nineteen years, and rather more of which is before action, the rest of the twenty years being made up during the continuance of the action. It seems to me that such a contention is directly contrary to the meaning of these two sections. I think, therefore, that the action can only be brought after the period of twenty years has elapsed." The report concludes: "An interlocutory injunction was granted restraining the defendants from building higher than the buildings existing in July, 1875, so as to obscure the plaintiff's windows." Although, then, the action could not be maintained as having been begun before the plaintiff's right had accrued, still, an injunction was granted him to restrain the defendants from going higher than the old buildings which had been torn down.

When we turn to the report in *The Reports*, we find an explanation. It there appears that the defendants' buildings which were pulled down were 45 feet in height. No. 75 was pulled down in June, 1875, and the others in October or November, 1875, so that the twenty years had elapsed between the pulling down of house No. 75 and the beginning of the action. The defendant now proposed to build houses over 60 feet high on the site. The argument for the plaintiff was that, as to Nos. 72, 73 and 74 which had been pulled down for only 19 years 9

months, the plaintiff's house had enjoyed access of light for the full period within the meaning of the statute, i.e., twenty years less a fraction of a year, which was immaterial, because the year's interruption could not now take place.

The report of the judgment does not materially differ from that in the Law Reports as to the broken period, except in that most essential feature, that it distinguishes between the plaintiff's supposed right as to the site of the houses pulled down within that period and house No. 75; and in the material fact that the defendants proposed to build higher houses than those which had been pulled down. "As to the buildings on the site of No. 75, I can do what is asked, but as to the buildings on the site of the other houses, the case is different. As to them, the action has not been brought twenty years after the old buildings were pulled down; but the question arises whether an injunction may not be granted upon the grounds that, at the beginning of the twenty years before the commencement of the action, there were other buildings standing on the site, and that though the defendants may have a right to build to the height of those old buildings, they are now threatening to build a great deal higher than the old buildings. . . . I think there is enough ground for me to say that the builders ought not to be allowed to carry up the buildings on the site of Nos. 72, 73 and 74 to a greater height than they were prior to the time when the buildings were taken down in October or November, 1875."

So it appears then, that an injunction will not be granted where no injury is threatened. The right of the plaintiff as to the site of house No. 75 was complete by lapse of time, and an injunction as to that part of the site was properly asked for. But the same right did not exist with respect to the site of houses Nos. 72, 73 and 74. As to these, no right existed save that which had accrued by reason of the right of the plaintiff to compel the defendants to maintain houses at a height at the most of 45 feet; and the threatened action of the defendants to raise them to a

height of 60 feet was an infringement of a right not depending at all upon the lapse of the 19 years 9 months. No doubt this could be spelled out from the report in the Law Reports with careful reading and ratiocination; but it cannot be ascertained from it that the site of house No. 75 was treated differently from the others.

Apart altogether from these questions, the main point as to the impossibility of destroying the plaintiff's inchoate right by interruption for a year before the expiration of the twenty years is an interesting one and capable of much debate, although the interpretation of the sections in question has been defined by the House of Lords. In *Flight v. Thomas*, 11 Ad. & E. 688; 8 Cl. & F. 231, the facts were that the plaintiff had enjoyed the access of light through a window which had overlooked the adjoining premises for 19 years and 330 days, when the defendant built a wall on his land which obstructed the access of light to the window. After the full period of twenty years had elapsed from the first use of the window by the plaintiff, he brought an action against the defendant. The defendant set up that the plaintiff's right was not complete, because he had not enjoyed it for the full twenty years. The plaintiff alleged that enjoyment for a full twenty years was not necessary, but enjoyment for twenty years without interruption for a year; and, as the interruption had been for only 35 days, he had enjoyed the right for the necessary period to entitle him to succeed. Baron Parke directed the jury that the plaintiff's interpretation of the statute was right, and a verdict was found for the plaintiff. In the Exchequer Chamber, Tindal, C.J., said: "It must undoubtedly be admitted that there are difficulties attending the act whichever way it be construed. If construed in favour of the plaintiff below, it follows that an enjoyment for nineteen years and a fraction will establish the right, provided the action be brought before the interruption has continued for the full period of a year. If decided in favour of the defendants below, then we must hold an obstruction for less than a year to be an

interruption." The Court held that there was "no interruption within the meaning of the Act, and, consequently, that the actual enjoyment of the use of the light continued for the full period of twenty years without interruption, and that the direction by the learned Baron was right." This was affirmed by the House of Lords. The Lord Chancellor put the very fine distinction, but one resting on the words of the Act itself, that it is not the full twenty years' enjoyment that gives the right, but twenty years' enjoyment without the interruption mentioned by the Act. i.e., interruption for a year.

The result is therefore, that enjoyment for nineteen years and a fraction will give the plaintiff a complete cause of action, if he brings his action promptly before a year's interruption has run, and after the full twenty years has run out. Comparing this decision with that in *Battersea v. Commissioners*, the conclusion to be arrived at is, that the right is not inchoate or existent at all until the twenty years has elapsed without interruption for a year; but if the interruption commences in the nineteenth year and runs for a year before action is brought it is lost, though in the interval after expiry of the twenty years, and before expiry of the year of interruption, the plaintiff had a good cause of action. The plaintiff's right to an injunction to prevent the building of a wall, which he may afterwards abate by action, if he chooses, does not exist; but this slender theory seems to depend altogether upon the hypothesis that he may not bring his action after the twenty years period, and before the expiry of a year of interruption. The bringing of an action to prevent the building is no indication that he will necessarily assert his right when the cause of action is complete. Here, then, seems to be a case where a plaintiff may at the right juncture by action compel the destruction of buildings, which he has been obliged to stand by and see erected, whereas he cannot anticipate the difficulty and prevent their erection in the first place. This is one of the curiosities of the Statute of Limitations.

Solicitor and Client.

The disability of a solicitor to benefit by the gift of a client is a familiar quantity. But the case presents itself in a new light in *Liles v. Terry*, 12 Times L. R. 26, where the wife of a solicitor, who was the niece of the client, was held to share the disability of her husband. It appeared that the plaintiff had recovered some property in litigation in which the solicitor had acted professionally for her, and at the conclusion of the litigation told the solicitor that, if he would make no charge for his services, she would leave the premises to her niece. The solicitor produced to her a will and a deed, the latter conveying the property to the solicitor in trust for the plaintiff for her life, then to her sister for life, with remainder to the solicitor's wife for her sole and separate use, and the plaintiff executed both. An independent witness for the defence swore that the nature of the two documents was fully explained to the plaintiff before she signed them. The Court, however, set aside the deed, on the ground that the plaintiff had had no independent advice.

The statement of facts by the Court is all that could be desired on behalf of a perfectly honourable solicitor, but the rule of law is so rigid that it is "so much the worse for the facts." The Master of the Rolls said, "He was of opinion that the facts as found by Mr. Justice Charles represented the truth—that is to say, the intentions of the plaintiff were carried out, and the difference between a will which she could revoke and a deed which was irrevocable was explained to her, and she understood the effect of what she was doing. The deed was not intended to benefit the solicitor, and it could not do so; it was intended to benefit the solicitor's wife, who was the plaintiff's niece. In spite of all that, however, the rule established by the Courts of Equity was that, because the defendant was a solicitor and because the plaintiff had no independent advice, the gift was void, and the solicitor's wife must lose all the benefits which the plaintiff had previously intended to confer upon her. The rule of

equity was, that the presumption of undue influence in cases such as this was a presumption of law, and one, therefore, which could not be met or refuted by any facts, His Lordship admitted that the rule might work "terrible injustice"; but Lord Justice Lopes did not share in this opinion. It would be interesting to know whether the plaintiff subsequently paid the solicitor for his services in the litigation in which the property was recovered.

The Authority and Privilege of Counsel.

Curiously enough, cases sometimes come in batches of twos and threes. We had occasion not long ago to refer to a case in which the authority of counsel to compromise arose, and in which the mode of taking the evidence, if it can so be called, was also determined: ante, p. 194.

The same question as to the privilege of counsel arose in *Hickman v. Berens*, L.R. (1895) 2 Ch. 638, and also out of a compromise by counsel. It appeared that the leading counsel came into a referee's Chambers from another Court and found the parties discussing a compromise. Being of impression that certain discounts, the subject of the discussion, were cash discounts, as to which there was some uncertainty, and not trade discounts, as to which there was no doubt, he agreed to a compromise as to discounts generally. It was subsequently discovered that a mistake had been made, and the Court of Appeal opened up the matter on the ground of mistake, as the parties were not *ad idem*.

The Court relied wholly upon the statement of the counsel concerned as to what his intention and supposition was when he entered into the compromise. The preceding case, *Kempshall v. Holland* was referred to, and the reporter was ordered to communicate with the counsel in that case as to what course had been followed in that case in taking his statement. It was doubted whether, counsel not being briefed in this case, his statement should be taken or an affidavit made. His reply is given in full, from which it appears that he appeared in Court on the

occasion ; and, on being asked whether he was willing to make a statement, declared that he had written out one and that a copy had been furnished to both parties ; that he had also made an affidavit, in case the Court required it ; but that Lord Esher said they never would admit an affidavit, but trusted to the honour of counsel, and asked if the statement might be read. That having been assented to, it was read and commented on, and the Court then asked counsel some questions, which he answered from his place in Court.

It appears in the later case that the counsel, who had appeared before the referee on the compromise, was formally briefed on the motion, and made his statement to the Court from his place within the bar.

BOOK REVIEWS.

A Treatise on the Law of Landlord and Tenant, applicable to the Dominion of Canada. By S. R. CLARKE, of Osgoode Hall, Barrister-at-Law, author of "The Criminal Law of Canada," "The Insolvent Act of 1875 and Amending Acts," and the "Magistrates' Manual." Toronto: The Carswell Co. 1895.

This is by far the most ambitious text book yet published in Canada, and we cannot say that the author has not attained his ambition. The book comprises 882 pages of text, and covers every possible phase of the subject. The authorities cited are English, Canadian and American, and are very numerous. Even the size of the volume does not convey an adequate idea of the industry of the author. It is only when one peruses the text, which is exceedingly concise, being condensed in many parts almost to the solidity of a digest, that one can appreciate the labour that has been expended. No doubt the work was far advanced before the recent Act abolishing tenure between landlord and tenant was passed, for the author has only a passing reference to it. We had hoped upon picking up the book, to find some light thrown upon the effect of this enactment, but perhaps the author was wise not to hazard an expression of opinion. We can thoroughly recommend this work to the profession at large. A very useful collection of forms is added to the text. With regard to the arrangement of the text, the insertion of authorities in the body of the page is apt to break the continuity of thought, and to distract the attention during perusal. The orthodox plan of putting cases in the foot notes seems to us to be preferable. One lamentable defect is the want of a good index. The index prepared is the most meagre article, and is no efficient guide to the work, which is worthy of a large analytical index.

The Ontario Law Index, embracing all the legislation of the Province of Ontario, down to and including the year 1895. By HARRIS H. BLIGH, Q.C., Librarian of the

Supreme Court of Canada; Editor of the "Consolidated Orders in Council of Canada," and one of the compilers of the Dominion Law Index. Toronto: The Carswell Co. 1895.

This is by far the best index of Ontario legislation that has yet been produced. Mr. Bligh has included in it not only the Public Acts, but all the Private Acts of the province, and the repealed as well as the extant legislation. Not content with confining himself to the title of the various Acts, he has indexed some of the contents of the statutes themselves. We have made several tests with regard to both public and private legislation, and have found the Acts sought for on the first attempt; and we think that most people will agree that that is a very fair test of the index.

Ontario Assignment Acts with Notes. By RICHARD S. CASSELS, of Osgoode Hall, Barrister-at-Law. Toronto: The Carswell Co. 1895.

This is really a second edition of a pocket book on the Assignment Acts published some time ago, with notes, by Mr. Cassels. We sincerely think that Mr. Cassels is too modest in confining himself to a mere annotation of the Act. His previous book was constantly referred to, and we can predict the same of this edition. The notes are almost too concise, though they consist with the evident purpose of the author to limit the size of his work. We would strongly recommend Mr. Cassels, in publishing a new edition to depart from the system of annotation and extend the work into a treatise on a subject which he is well capable of dealing with. In the meantime we shall have to be satisfied with the fare provided for us.

Principles of the Common Law. Intended for the use of students and the profession. By JOHN INDERMAUR, Solicitor; author of "Manual of Practice," "Epitome of Leading Cases," "Manual of the Principles of Equity," etc., etc. Seventh edition. London: Stevens & Haynes. 1895.

This well-known work appears with as great regularity as several other of the standard educational books testifying to its popularity and usefulness.

CORRESPONDENCE.

The Supreme Court.

To the Editor of THE CANADIAN LAW TIMES:

SIR,—The statute establishing “The Supreme Court of Canada” declares that it shall consist of a Chief Justice and of five puisne Judges, at least two of whom shall be appointed from the Province of Quebec.

The question of the representation of the different provinces in the *personnel* of this Court has been engaging the attention of the Western Law Times. It is claimed that one of the members of the Court should be appointed from western Canada, and on principle we have nothing to say against this suggestion.

What we do object to most strongly, however, is that this proposed western representative should be obtained at the expense of limiting our own Province of Ontario to a single member. Never since the establishment of the Court has Ontario been represented by less than two members, and at one time she had three.

Ontario is the largest contributor to the business of the Supreme Court. She has the largest bar of any Province in the Dominion, among whom are numbered many men eminently qualified to interpret the law in this the highest Court in the land.

In our opinion, if the representation of the Province of Quebec is fixed at two members, that of Ontario should at least be equal to it, and the remaining two might be selected, one from the east and one from the west.

In the past, the older provinces of the east have monopolized the Court at the expense of the west. But this

furnishes no reason why Ontario should not now be represented by two members, as she has always been, or why, at the present juncture, the vacancy, soon to occur in the Court, should be filled from the west.

The vacancy should be filled from Ontario, and we think our western brethren have chosen a most inopportune time to press their rights to representation.

Yours, etc.,

BARRISTER.

Notarial Fees.

To the Editor of THE CANADIAN LAW TIMES:

SIR,—There is on the statute book of this province a full and formal statute (R. S. O. c. 153), authorizing the Government to appoint notaries public. This is one part of its patronage, and appointments are gazetted almost weekly. But there is this serious omission, viz: that the proper fees which the notary may charge for the various acts which, under his commission, he may do in this province are not prescribed.

The Dominion statute as to Bills of Exchange and Promissory Notes distinctly sets down the lawful fees which a notary may charge for services under that statute. And it would save misunderstandings, and no doubt in some instances prevent overcharges, if the provincial Act prescribed the fees which might be lawfully taken for certifying papers to be sent out of the province, attesting the execution of documents, use of seal, and other matters.

Yours, etc.,

SUBSCRIBER.

November 22nd, 1895.

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THE
CANADIAN
LAW TIMES
NOTES OF CASES
AND
INDEX-DIGEST FOR 1895.

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VOL. XV.

TORONTO :
THE CARSWELL Co. (LTD.) PUBLISHERS,
1895.

Entered according to Act of the Parliament of Canada, in the year one thousand
eight hundred and ninety-five, by THE CARSWELL Co. (Limited), in the
office of the Minister of Agriculture.

THE
CANADIAN LAW TIMES
—
OCCASIONAL NOTES.
—

Supreme Court of Canada.
—

ONTARIO.]

[9TH OCTOBER, 1894.]

In re HESS MANUFACTURING COMPANY.

SLOAN'S CASE.

Company—Winding-up—Contributory—Promoter of company—Trust—Sale of property to company by—Rescission—Stock.

Two brothers named H., being desirous of purchasing a site for erecting a building in which to carry on the manufacture of furniture, and not having the means to do so, applied to S., father-in-law of one of them, for aid in the undertaking. S. obtained from the owners a conveyance of a site, the consideration being the erection of the building and running of the factory within a certain time, or, failing that, the sum of \$8,000. The building was erected within the limited time, and, a company having been formed, the manufacturing business was started. S. was one of the provisional directors of the company, having subscribed for shares to the amount of \$7,500, and subsequently the son of S. and the two brothers were

appointed directors, through whom S. transferred the property to the company, having previously mortgaged it for \$7,000, it having cost \$7,300, besides which some \$5,000; had been expended on it, the money being supplied by the wives of the two brothers. On the property being transferred to the company, 860 shares of the capital stock, of the value of \$50 each, were allotted to S. as fully paid up shares, and to include his former subscription. Of these shares 284 were afterwards transferred by S. to his son and daughter. The company having failed, the liquidator appointed under the Winding-up Act applied to the Master to have S. placed on the list of contributories for the 860 shares. The Master complied with this request to the extent of 126 shares standing in the name of S. when the winding-up proceedings were commenced, holding that S. purchased the property as trustee for the company, and so gave no value for the shares assigned to him. This ruling was affirmed by a Judge, 28 O. R. 182, but reversed by the Court of Appeal, 21 A. R. 66.

Held, affirming the decision of the Court of Appeal, that the circumstances disclosed in the proceedings showed that S. did not purchase the property as trustee for the company, but could have dealt with it as he chose, and having conveyed it to the company as consideration for the shares allotted to him, such shares must be regarded as being fully paid up, the Master having no authority to inquire into the adequacy of the consideration.

Held, also, that S. was a promoter, and as such occupied a fiduciary relation to the company, and having sold his property to the company through the medium of a board of directors, who were not independent of him, the contract might have been rescinded if an action had been brought for that purpose.

Where a promoter buys property for his company from a vendor who is to be paid by the company when formed, and, by a secret arrangement with the vendor, part of the price comes, when the agreement is carried out, into the promoter's hands, that is a secret profit which the latter cannot retain; and if any part of such secret profit consists of paid up shares issued as consideration for the property so purchased, they may be

treated, while held by the promoter, as unpaid shares for which the promoter is liable as a contributory.

S. H. Blake, Q.C., and Raney, for the appellant.

Moss, Q.C., and Haverson, for the respondent.

ALEXANDER v. WATSON.

Guaranty—Construction of agreement.

A., a wholesale merchant, had been supplying goods to C. & Co., when, becoming doubtful as to their credit, he insisted on their account being reduced to \$5,000, and on security for further credit. W. was offered as security and gave A. a guaranty in the form of a letter as follows :—

“I understand that you are prepared to furnish C. & Co. with stock to the extent of \$5,000 as a current account, but want a guaranty for any amount beyond that sum. In order not to impede their operations, I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of \$5,000, including your own credit of \$5,000, unless sanctioned by a further guaranty.”

A. then continued to supply C. & Co. with goods, and in an action by him on this guaranty :—

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there could be no liability on this guaranty unless the indebtedness of C. & Co. to A. should exceed the sum of \$5,000; and at the time of action brought such indebtedness having been reduced by payments from C. & Co. and dividends from their insolvent estate to less than such sum, A. had no cause of action.

Robinson Q.C., and J. B. Clarke, Q.C., for the appellant.

Delamere, Q.C., and E. T. English, for the respondent.

OELRICHS v. TRENT VALLEY WOOLLEN MANUFACTURING CO.

Sale of goods by sample—Right of inspection—Place of delivery—Sale through brokers—Agency.

C. & Co., brokers in New York, sent a sample of wool to the defendants at Campbellford in Canada, offering to procure for them certain lots at certain prices. After a number of telegrams and letters between the defendants and C. & Co., the offer was accepted by the former, at the price named, for wool "laid down in New York," and payment was to be in six months from arrival of wool at New York without interest. Bought and sold notes were respectively delivered to the defendants and the brokers, the latter signing the sold note. The wool having arrived, the defendants would only accept it subject to inspection when it reached their place of business in Canada, to which the seller would not agree, and it was finally sold to other persons, and an action brought against the defendants for the difference between the price realized on such sale and that agreed on with the brokers.

Held, affirming the decision of the Court of Appeal for Ontario, 20 A. R. 678, that the brokers could be considered to have acted as agents of the defendants in making the contract, but if not, the company, having never objected to the want of authority in the brokers nor to the form of the contract, must be held to have acquiesced in the contract as valid and duly authorized.

Held, also, that there being no special agreement to the contrary, the place for inspection of the wool by the buyer was New York, where the wool was to be delivered, and it made no difference that the defendants had previously bought wool from the same person who had sent it to Campbellford to be inspected.

Held, further, that the evidence of a usage of the trade as to inspection offered by the defendants was insufficient, such usage not being shown to have been universal and so well known that the parties would be presumed to have had it in mind

when making the contract, and to have dealt with each other in reference to it.

Robinson, Q.C., and Clute, Q.C., for the appellants.

McCarthy, Q.C., for the respondents.

QUEBEC.]

[9TH OCTOBER, 1894.

BURY v. MURRAY.

Absolute transfer—Commencement of proof by writing—Oral evidence—When inadmissible—Arts. 1233, 1234, C. C.—Prête-nom—Compensation—Defence—Taking advantage of one's own wrong.

Verbal evidence is inadmissible to contradict an absolute notarial transfer, even where there is a commencement of proof by writing not amounting to a full admission : Art. 1234, C. C.

A defendant cannot set up, by way of compensation to a claim due to the plaintiff, a judgment, purchased subsequent to the date of the action, against one who is not a party, and for whom the plaintiff is alleged to be a *prête-nom*.

In an action to recover an amount received by the defendant for the plaintiff, the defendant pleaded *inter alia* that the action was premature, inasmuch as he had got the money irregularly from the treasurer of the Province of Quebec on a report of distribution of the prothonotary before all the contestations to the report of collocation had been decided.

Held, affirming the judgment of the Court below, that this defence was not open to the defendant, as it would be giving him the benefit of his own improper and illegal proceedings.

Barnard, Q.C., and Lafleur, for the appellant.

Martin, for the respondent.

[11TH OCTOBER, 1894.

WEBSTER v. SHERBROOKE.

Appeal—Petition to quash by-law under s. 4389, R. S. P. Q.—R. S. C. c. 135, s. 24 (g).

Proceedings were commenced in the Superior Court by petition to quash a by-law passed by the corporation of the city

of Sherbrooke under s. 4889, R. S. P. Q., which gives the right to petition the Superior Court to annul a municipal by-law. The judgment appealed from, reversing the judgment of the Superior Court, held that the by-law was *intra vires*.

On motion to quash the appeal :—

Held, that the proceedings, being in the interest of the public, were equivalent to the motion or rule to quash of the English practice, and therefore the Court had jurisdiction to entertain the appeal, under R. S. C. c. 135, s. 24 (g).

Sherbrooke v. McManamy, 18 S. C. R. 594, and *Verchères v. Varennes*, 19 S. C. R. 356, distinguished.

Brown, Q.C., for the motion.

Panneton, Q.C., contra.

[18TH OCTOBER, 1894.]

McKAY v. HINCHINBROOKE.

Appeal—R. S. C. c. 135, ss. 24, 29—Contesting validity of valuation roll—Future rights—Costs.

Held, that a judgment in an action by a ratepayer contesting the validity of an homologated valuation roll, is not a judgment appealable to the Supreme Court of Canada under s. 24 (g) of the Supreme and Exchequer Courts Act; and does not relate to future rights under s. 29 (b).

Held, also, that as the valuation roll sought to be set aside in this case had been homologated, and not appealed against within the delay provided in Art. 1061, M. C., the only matter in dispute between the parties was a mere matter of costs, and therefore the Court would not entertain the appeal.

Moir v. Village of Huntingdon, 19 S. C. R. 363, followed.

Geoffrion, Q.C., and *Brossoit*, Q.C., for the appellant.

McLaren, Q.C., and *Laurendeau*, for the respondents.

[8TH NOVEMBER, 1894.]

LABERGE v. EQUITABLE LIFE ASSURANCE SOCIETY.*Appeal—Amount in dispute—54 & 55 V. c. 25, s. 3, s.-s. 4.*

By virtue of 54 & 55 V. c. 25, s. 3, s.-s. 4, in determining the amount in dispute in cases in appeal to the Supreme Court of Canada, the proper course is to look at the amount demanded by the statement of claim. And where the actual amount in controversy in the Court appealed from was less than \$2,000, the plaintiff having obtained a judgment in the Court of original jurisdiction for less than \$2,000, and not having taken a cross-appeal upon the defendants appealing to the intermediate Court of Appeal, a motion to quash was refused.

Levi v. Reed, 16 S. C. R. 482, approved and followed.

Gwynne, J., dissented.

Laflamme, for the appellant.

MacMaster, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.**High Court of Justice.****QUEEN'S BENCH DIVISION.**

[BOYD, C., 23RD OCTOBER, 1894.]

FITZGERALD v. CITY OF OTTAWA.

Municipal corporations—Drainage—Added territory—Old drain—Liability for overflow.

When the plaintiff's land was part of a township, he and his neighbours had, with the permission of the township

authorities, constructed a box drain in the highway to carry surface water therefrom. After the locality had become part of the defendants' territory, this drain collapsed, and the earth covering of it acted as a dam, which penned back the water upon the plaintiff's land. The defendants' engineer then made a cut which carried away the water for a time. This, however, became filled up, and the water again came on the plaintiff's land. He notified the defendants, but they did not remedy the matter until after substantial injury was done.

Held, that they were liable.

Wyld, for the plaintiff.

O'Gara, Q.C., for the defendants.

CHANCERY DIVISION.

THOMPSON v. SMITH.

Will—Devise—"My lawful heirs"—Time when heirs ascertained.

A testator, after a gift to his daughter and her mother for their joint lives and to the survivor of them, directed that "at the decease of both the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs." At the death of the testator his daughter was his only heir.

Held, that the testator had himself excluded his daughter from being treated as one of his heirs, and by the expression "my lawful heirs" must be held to have meant the persons who at the time of the death of the last survivor of his wife and daughter should then be his heirs at law.

Wyld, for the plaintiffs.

O'Gara, Q.C., and *MacTavish*, Q.C., for the defendant.

[MEREDITH, C.J., 12TH DECEMBER, 1894.]

In re HALLOCK.

Contempt of Court—Commitment—Disobedience to habeas corpus—Notice—Signature to writ—16 Car. I. c. 10, s. 3.

An application to commit a person for contempt of Court in disobeying a writ of *habeas corpus* will not be entertained unless a notice has been served upon him informing him of the consequences of failure to obey, nor unless the writ is signed by the person awarding it, as required by s. 8 of 16 Car. I. c. 10.

C. W. Kerr, for the applicant.

[MEREDITH, J., 20TH NOVEMBER, 1894.]

TOWNSHIP OF BURFORD v. CHAMBERS.

Arbitration and award—Injunction restraining arbitrator acting—Interest as former solicitor—Jurisdiction of High Court.

The High Court has power to prevent an incompetent arbitrator from acting without waiting until the award is made, though perhaps the better course is to apply for leave to revoke the submission if another arbitrator be not substituted.

Malmesbury R. W. Co. v. Budd, 2 Ch. D. 118, and *Beddow v. Beddow*, 9 Ch. D. 89, followed.

A barrister and solicitor who had acted as counsel for the husband on an indictment and trial for obstructing an alleged highway claimed by his wife to be her property, and who had written a letter concerning the matter as solicitor for both husband and wife, was restrained from acting as arbitrator.

Vineburg v. Guardian Fire and Life Assurance Co., 19 A. R. 298, followed.

H. M. Mowat, for the plaintiffs.

S. A. Jones, for the defendants.

IN CHAMBERS.

[BOYD, C., 11TH DECEMBER, 1894.]

WELBOURNE v CANADIAN PACIFIC R. W. CO.

Discovery—Examination—Pleading—Champerty and maintenance.

Discovery will not be enforced in equity in cases of champerty and maintenance, nor should it be under the equivalent remedies given by the Judicature Act; and a plaintiff should not be compelled on examination to answer questions touching an alleged champertous agreement.

Semble, that the rigorous rules which obtained in earlier days in England are not to be imported into the dependencies of England without some modification.

Ram Coomar v. Chunder, 2 App. Cas. at p. 210, specially referred to.

To an action under Lord Campbell's Act the defendants pleaded that it was brought and maintained under a champertous agreement which disentitled the plaintiff to sue.

Held, that this defence should not be struck out; if proved, it was for the Court to say what effect should follow.

W. J. Elliott, for the plaintiff.

Angus MacMurchy, for the defendants.

CARLISLE v. ROBLIN.

Costs—Taxation—Searching affidavit—Registrar's abstract—Counsel fee on ex parte order—Filing order—Engrossing—Counsel fees—Discretion—Witness fees—Brief.

Held, upon taxation of costs the following items should not be taxed against the opposite party:

1. Attendance to search affidavit on production.
2. Attendance to bespeak and for registrar's abstract to prepare for litigation or prove title.

8. Counsel fee on attendance to obtain *ex parte* order.
4. Attendance to file order for subpoena.
5. Engrossment of same order.

The question of the allowance of counsel fees is one for the discretion of the taxing officer; and where the action is strenuously contested on both sides, it is proper to allow fees to both senior and junior counsel.

Where witnesses in attendance at the trial are not called, the *onus* is on the party subpoenaing them to shew their relevancy; and in this case he failed to do so.

Where fees paid to such witnesses are disallowed, the portions of counsel's brief containing their evidence should also be disallowed.

Alcorn, Q.C., for the plaintiff.

D. Armour, for the defendants.

[15TH DECEMBER, 1894.]

MERIDEN BRITANNIA CO. v. BRADEN.

Costs—Separate defences—Indemnity against costs—Taxation against opposite party.

Action to set aside a chattel mortgage made by an insolvent to a trading firm and a sale made thereunder to a third defendant. The firm agreed to save the third defendant harmless so far as the costs of the action were concerned. He defended separately, and in his written retainer to his solicitors it was provided that the costs should be charged to the firm. The plaintiffs having been ordered to pay the costs of the defendants:—

Held, a proper case to allow two sets of costs, and that no disability existed on the part of the third defendant to tax and recover his costs against the plaintiffs.

Jarvis v. Great Western R. W. Co., 8 C. P. 280, and *Stevenson v. City of Kingston*, 81 C. P. 888, distinguished.

J. Bicknell, for the plaintiffs.

C. D. Scott, for the defendant Scott.

[MEREDITH, C.J., 17TH NOVEMBER, 1894.]

MALCOLM v. RACE.

Discovery—Action for penalties—Close of pleadings—Notice of trial.

The plaintiff is not entitled to examine the defendant for discovery in an action for penalties under the Ontario Elections Act, 1892.

Hunnings v. Williamson, 10 Q. B. D. 459, and *Martin v. Treacher*, 16 Q. B. D. 507, followed.

A defendant by simply taking issue upon the statement of claim closes the pleadings, and may then serve notice of trial.

Hare v. Cawthrope, 11 P. R. 358, followed.

W. H. Blake, for the plaintiff.

Aylesworth, Q.C., for the defendant.

[MEREDITH, J., 28TH NOVEMBER, 1894.]

IRWIN v. TURNER.

Pleading—Counter-claim—Joinder of issue—Defence—Reply—Close of pleadings—Notice of trial—Rules 379-383—"Plaintiff."

A pleading delivered by the defendants to a counter-claim, in answer thereto, whether by the original plaintiff or by added defendants, which denies the allegations in the counter-claim, puts the plaintiff to the proof thereof, and submits that the counter-claim should be dismissed, is not a joinder of issue, but a statement of defence to the counter-claim; the plaintiff by counter-claim has by the Rules three weeks to reply thereto; and the pleadings, at least *quoad* the counter-claim, are not closed until after the lapse of three weeks or until the plaintiff by counter-claim has joined issue.

Notice of trial set aside where given by the original plaintiffs after the lapse of four days from the delivery of such a pleading, no subsequent pleading having been delivered.

Construction of Rules 379-383.

Hare v. Cawthrope, 11 P. R. 858, distinguished.

Irwin v. Brown, 12 P. R. 689, overruled.

Quære, whether "plaintiff" in Rule 881 does not include a plaintiff by counter-claim.

B. Morton Jones, for the plaintiffs.

W. H. Blake, for the defendants.

In the Seventh Division Court in the United Counties of Northumberland and Durham

[KETCHUM, JUN. J., 18TH DECEMBER, 1894.]

CHRISTIE v. CASEY.

Attachment of debts—Accruing rent—Division Courts,

KETCHUM, Jun. J.—Rent accruing, but not yet payable, cannot be attached in the Division Courts.

In *Massie v. Toronto Printing Co.*, 12 P. R. 12, it was held that rent which had accrued by virtue of R. S. O. 1877, c. 136, now R. S. O. 1887, c. 148, up to the date of the attaching order, could be attached under Rule 870, now 985, by which debts "owing or accruing" are made attachable; but I think that decision conflicts with *Webb v. Stenton*, 11 Q. B. D. 518.

In the Division Courts debts to be attachable must be "due or owing," and there must be a debt *debitum in presenti*, though it may be *solvendum in futuro*. Accruing rent is not such a debt: *per* Crompton, J., in *Jones v. Thompson*, E. B. & E. 63, as cited in *Webb v. Stenton*, at p. 528. The Act R. S. O. c. 148, s. 2, does not make it such a debt, nor does it make it a debt "due or owing," but "accruing" *de die in diem*: *In re United Club and Hotel Co.*, W. N. 1889, p. 67.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 15TH DECEMBER, 1894.]

REGINA v. EARL.

Criminal law—Alleged disqualification of juror—Want of knowledge of the English language—Crown case reserved.

The defendant was convicted of an attempt to commit rape. When brought up for sentence, he applied to have a case reserved, and a question was stated for the opinion of the Court as follows: "Is the fact that one of the twelve jurors sworn to try the prisoner did not thoroughly understand the English language a sufficient ground for holding, under the circumstances, that there has been a mistrial, and that the prisoner should be granted a new trial?"

Per CURIAM:—If the objection to the juror was a ground of challenge, it was too late to take it when taken: *Rex v. Sutton*, 8 B. & C. 417. Unless a juryman be challenged before he is sworn, he cannot be challenged afterwards, except by consent. The objection taken here was not a ground of challenge. The Jury Act, R. S. M. c. 81, s. 4, states who are disqualified from being returned and serving as either grand or petit jurors, and the objection made cannot be brought under any of the heads of disqualification, nor does it come under s. 668 of the Criminal Code.

The Court has not in a criminal case the discretion as to granting a new trial which it has in civil actions: *Regina v. Murphy*, L. R. 2 P. C. 535.

The present case is one not provided for by the Act, and the Court has no power to interfere.

The utmost which the accused could have asked, after the swearing of the juror, was to have the proceedings interpreted into the French language.

Howell, Q.C., for the Crown.

Andrews, for the prisoner.

[TAYLOR, C.J., 4TH DECEMBER, 1894.]

SMITH v. UNION BANK.

Interpleader—Crops to be grown—Execution—Lien contract in favour of vendor of land—Priorities.

Interpleader issue to determine whether a quantity of grain seized under an execution in a suit by the bank against one Chapman was at the time of the seizure the property of Smith as against the bank.

At the trial an agreement was put in, dated 18th January, 1890, made between Smith and Chapman, which recited that Smith had agreed to sell and Chapman had agreed to purchase certain land for \$8,000, payable in eight annual instalments. Then, after provisions as to the breaking of so much land and the erection of buildings, the agreement provided that all grain and produce grown upon the premises should remain the property of Smith and should not be removed therefrom until the then current year's payment of principal money and interest should have been made, without Smith's authority.

Admissions were made to the effect that the agreement of 18th January, 1890, was executed and delivered on the date it bore, that it had never been registered, that default had been made in payment, and there was at the time of the seizure default in principal and interest; that during the whole of 1894, up to the time of the seizure, Chapman was in possession and was so in pursuance of the terms of the agreement; that in pursuance of the terms of the agreement he produced from the land of which he was so in possession the grain seized and in question, supplying all the seed and work therefor; that the writ of execution was issued, and the debt for which it was

issued was contracted, subsequent to the making of the agreement of 18th January, 1890; that the writ was placed in the sheriff's hands on 1st May, 1893; that the seizure was made on 27th September, 1894, under the execution mentioned in the issue, of all the crop grown during the season of 1894 on the land; that the crop so seized was what was in dispute in the issue; that it was seized upon the land on which it had been grown; and that it had not therefore been removed therefrom.

Held, that when the crop in question came into existence, the property in it and the legal title to it were in Chapman. Under the agreement no property in the crop passed to Smith; at most it gave him an equitable right to enter and take the crop when it came into existence, or to call for the execution of a formal and legal mortgage upon it. When, in 1894, the crop came into existence, the property in it was in Chapman, and there was then in the hands of the sheriff an execution against him at the suit of the bank. By virtue of that execution the crop was bound the instant it came into existence, and the bank had a legal right, which took effect before the equitable right of Smith was turned into a legal one.

The rights of the bank under their execution must prevail over the equitable rights of Smith, and a verdict should be entered for the defendants.

Clifford v. Logan, 9 Man. L. R. 424, followed.

A. D. Cameron, for the plaintiff.

Ewart, Q.C., for the defendants.

[7TH DECEMBER, 1894.]

THOMPSON v. DIDION.

Costs—Taxation—Two defendants—Separate defences—One set of costs.

The bill in this case was dismissed against the two defendants with costs to be paid by the plaintiffs: *ante* pp. 409-458. On taxation the Master allowed the defendants only one set of costs between them, and from his ruling each of them appealed.

The Master found they were in the same interest, and there was no need for their defending separately. From his written memorandum giving the reasons for his ruling it appeared he came to the conclusion that there was not, in this case, any *bona fide* defence by two separate solicitors, but there was in fact a defence by one solicitor, although the name of another was used. Being satisfied that this was the case and that the costs of duplicating all the proceedings were unnecessary and therefore improper, he allowed only one set of costs.

Held, that the Master came to a correct conclusion, and in ruling as he did exercised sound discretion. That being so, the present appeals should be dismissed with costs. As they were argued together, the plaintiffs could have only the one bill of costs, the amount of which, when taxed, should be set off *pro tanto* against the costs which had been taxed to the defendants.

[KILLAM, J., 12TH NOVEMBER, 1894.]

FRASER v. SUTHERLAND.

Crown patent—Suit to set aside—Different plans—Discrepancy in frontage—Estoppel—Covenant for further assurance—Estate subsequently acquired by covenantor.

Bill praying a declaration that the defendant was a trustee of certain lands for the plaintiff, and that he might be ordered to convey the same to the plaintiff.

The defendant and others, having claimed a right of common over lot 85 in the parish of St. John, conveyed the land in 1872 to trustees for the purpose of having it divided and sold for their benefit. The trustees, of whom the defendant was one, employed one Sinclair, who made a plan of a subdivision of a part of the lands, upon which plan the trustees made a distribution of the lots; they conveyed to the defendant lot H. together with the adjoining lot A. according to Sinclair's plan. Lot H. was conveyed by the defendant to one Clarke, a predecessor in title of the plaintiff.

Subsequently another plan was made of the same land by one McPhillips, in which lot A. was given a wider frontage and overlapped about 48 feet on lot H. according to Sinclair's survey. The defendant subsequently made an application for a patent for lot A. according to McPhillips' survey, his claim being based on the conveyance to him from the trustees. The arrangement entered into by the trustees being recognized by the Department, a patent was issued to the defendant in 1888; it recited that the lands granted were Dominion lands; that the defendant had applied for a grant thereof; that his claim had been investigated and he had been found entitled to the same. The patent granted lot A. as shown on McPhillips' plan, without defining boundaries or size.

The plaintiff had no notice or knowledge of the defendant's application for the patent. The defendant disputed plaintiff's right to any relief, and set up that he had been in possession of the 48 feet in dispute for over ten years, though the trial Judge found against him on this point.

The defendant's deed to Clarke, the plaintiff's predecessor, was made before 14th May, 1875, when the first statute relating to short forms of indentures was passed.

It purported to be made in pursuance of the Act respecting short forms of conveyances, and was in the form set out in the first schedule to the Short Forms Act, afterwards R. S. M. c. 141, with the covenants in column one, but it contained no recitals.

At the hearing it was assumed, though not expressly admitted by the defendant's counsel, that under s. 2 of the Act the effect of the deed was to make the defendant's covenants equivalent to those in the second column of the first schedule to the Act, and it was contended by the plaintiff that this worked an estoppel against the defendant. The deed did not come within the Estoppel Act, R. S. M. c. 52.

Held, that the defendant was not estopped by his mere grant from setting up a title subsequently acquired, at least when it did not appear that he had no title at all at the time of his grant.

Doe d. Oliver v. Powell 1 A. & E. 581; *Right d. Jefferys v. Bucknell*, 2 B. & Ad. 278, followed.

In the absence of legislation covenants do not estop: *Heath v. Crealock*. L. R. 10 Ch. 22; *General Finance Co. v. Liberator Building Society*, 10 Ch. D. 15; and *Onward Building Society v. Smithson*, [1898] 1 Ch. 1.

Specific performance of the defendant's covenants for further assurance could not be decreed without an amendment of the bill, which did not set out the covenants in the forms in the deed, or in those which the statute gives to them.

When no legal estate passes, the covenants do not run with the equitable title so as to enable the assignee to sue at law : *Onward Building Society v. Smithson*, [1898] 1 Ch. 1.

The plaintiff had only a portion of the land affected by the defendant's conveyance to Clarke, and the defendant stated the purchase was not wholly paid. Could a Court of equity decree specific performance of the covenant at the instance of an assignee of an equitable title to a portion of the land affected thereby ?

It appeared clear from *Browning v. Wright*, 2 B. & P. 18, and the wording of the covenant number 5 in the schedule, that the covenantor was not bound under covenant to convey or assure to the covenantee or his assigns any estate subsequently acquired by the covenantor and which he had never previously held.

The plaintiff had wholly failed to establish the title set up by him, a title in fee simple, whether legal or equitable, or that there had been such mistake as, under the judgment in *Attorney-General v. Fonseca*, 17 S. C. R. 612, would warrant the setting aside of the patent.

Bill dismissed with costs.

Kennedy, Q.C., and *Perdue*, for the plaintiff.

Culver, Q.C., and *Sutherland*, for the defendant.

[BAIN, J., 11TH DECEMBER, 1894.]

NORTH-WEST COMMERCIAL TRAVELLERS' ASSOCIATION
v. LONDON GUARANTEE AND ACCIDENT
COMPANY.

Insurance—Accident—Construction of policy—Death by accident.

Action on an accident policy issued by the defendants in favour of one C. F. Church, a commercial traveller and member

of the plaintiff association. The contract of the defendants was that they would pay the insurance money to the insured or his representatives within 90 days after sufficient proof that the assured "shall have sustained bodily injuries effected through external, violent, and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed, and that such injuries alone shall have occasioned death within 90 days from the happening thereof," but it was provided that the insurance "shall not extend to death or disability caused by an injury of which there shall be no external or visible signs or wholly or in part by bodily infirmity or disease nor to any case except where some injury effected as aforesaid is the proximate and sole cause of the disability or death. And no claim shall be made under this policy where the death or disablement may have been caused by injury received while duelling, fighting, wrestling, or lifting, or by over exertion, suicide, sunstroke or self-inflicted injuries or in consequence of exposure to any obvious or unnecessary danger," etc.

At the time deceased met his death he was actually engaged in the occupation or calling with special reference to which the insurance was effected, and was on a business trip across the prairie near Fort Macleod, with a waggon and a four horse team and a driver; the latter, finding the travelled road obliterated by drifting snow, left it and struck across the country. Before they reached Macleod the waggon broke down; as deceased could not ride and was not able to walk to Macleod, about eight miles off, it was agreed that he should remain with the waggon and the driver should ride in on one of the horses and return with or send out assistance. A party started out, but in the darkness lost their way, and returned without finding the deceased. A second party started out and found the waggon and deceased lying dead beside it, with his face and hands frozen solid. Although the weather was exceedingly cold and there was a driving snow storm, there was nothing in the evidence to lead one to suppose that, in starting to drive to Macleod when he did, the deceased was doing anything that would be considered unusual or reckless, or that he was exposing himself to any unnecessary danger, or that he was insufficiently prepared for such a drive.

Held, that the deceased died from exposure to severe cold, and was frozen to death, which was certainly the result of accident, using the word in a general sense. In construing a contract like the one in question, the rule that should be followed is that the words of the policy are to be construed not according to their strictly philosophical or scientific meaning, but in their ordinary and popular sense. As it was the defendant company itself which prepared the contract, any ambiguity there might be found in it should be taken most strongly against the company. Apart from the medical testimony, there could be no hesitation in holding that the proximate and sole cause of death was a bodily injury, and that there were external and visible signs of that injury.

The expression "accidental means" was used in the policy in a very general sense; it implied the idea of something happening that was not foreseen or foreseeable by a person of ordinary prudence and intelligence, under the circumstances in which he happened to be placed.

Howell, Q.C., and *Mulock*, Q.C., for the plaintiffs.

Cameron, for the defendants.

FROST v. DRIVER.

Real Property Act—Second caveat filed without leave.

On the presentation of the petition herein, under the Real Property Act, an objection was taken, on behalf of the caveatee, that the caveat in pursuance of which the petition was filed was invalid and of no effect. Notice of the application of the caveatee was served on the caveator on 20th May, 1894, and on 30th May they filed a caveat. Afterwards on 20th June following they filed another caveat, without having obtained an order from a Judge for so doing, and it was under this last filed caveat that the petition was presented. It was asserted that it was the practice to allow a second caveat to be filed without a Judge's order, as long as the first one filed had not lapsed or been withdrawn or discharged.

Held, that such practice, if it existed, was contrary to the provisions of the Real Property Act. The caveat on which this petition was presented was filed without authority and was altogether invalid. The petition could not be received, and must be dismissed with costs.

Mathers, for the caveator.

Clark, for the caveatee.

MARTIN v. NORTHERN PACIFIC EXPRESS COMPANY.

Discovery—Examination of officer of express company—Local agent.

Appeal from an order made by the referee for the examination of one Cornell, the agent of the defendants at Wawanesa, upon the defendants' pleas.

The action was brought to recover \$2,000, alleged to have been handed to the defendants in Winnipeg for transmission to the plaintiff's agent at Wawanesa. The main question in issue was whether or not Cornell delivered the package of money to the agent of the plaintiff to whom it was addressed at Wawanesa.

The defendants did not deny that they had an office and transacted business at Wawanesa, and admitted that at the time of the transaction Cornell was in charge of this office, and was their agent there. But as he was also the agent for the railway company and received a commission and not a stated salary from the defendants, it was argued he was not an officer of the defendants.

Held, that whether Cornell was an officer or not, he was the defendants' chief agent or representative at the office mentioned, and so, by the express words of s. 40 of the Administration of Justice Act, was to be deemed to be an officer of the company for the purpose of examination.

Cameron, for the plaintiff.

Wilson, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.]

[15TH JANUARY, 1895.

GARFIELD v. CITY OF TORONTO.

Municipal corporations—Sewers—Damages.

Where a sewer, built without any structural defect, is of sufficient capacity to answer all ordinary needs, the corporation is not liable for damages caused, as a result of an extraordinary rain-fall, by water backing into the cellar of a person compelled by by-law to use the sewer for drainage purposes.

Judgment of the Queen's Bench Division reversed.

Fullerton, Q.C., for the appellants.

J. Reeve, Q.C., for the respondent.

BOND v. TORONTO RAILWAY COMPANY.

Master and servant—Workmen's Compensation Act—Defect in arrangement of plant—Negligence—55 V. c. 30, s. 3.

Having car buffers of different heights, so that in coupling the buffers over-lap and afford no protection to the person effecting the coupling, is a "defect in the arrangement of the plant" within the meaning of the Workmen's Compensation Act, 55 V. c. 30, s. 3.

Judgment of the Queen's Bench Division affirmed.

J. Bicknell, for the appellants.

J. MacGregor and *R. G. Smyth*, for the respondent.

BARNES v. DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCIATION.

Fire insurance—Interim contract—Notice to terminate—R. S. O. c. 167, s. 114 (19).

Upon an application for insurance for four years and the giving of his note for the premium the applicant received an interim receipt containing the conditions, among others, that the insurance was subject to the approval of the directors, who should have power to cancel the contract within fifty days by letter, and that unless the receipt was followed by a policy within fifty days the contract of insurance should wholly cease and determine. No notice of cancellation was given and no policy was issued:—

Held, per HAGARTY, C.J.O., that this was a contract of insurance that could be terminated only in accordance with the 19th statutory condition.

Per BURTON and OSLER, JJ.A., that this was a mere incomplete or provisional contract of insurance, which came to an end in fifty days by effluxion of time.

Per MACLENNAN, J.A., that there was a contract of insurance, and that the provision for determination by effluxion of time was a variation from the statutory conditions, which was not binding, not being printed in the required mode.

In the result the judgment of the Queen's Bench Division, 14 Occ. N. 210, 25 O. R. 100, in favour of the plaintiff, was affirmed.

Aylesworth, Q.C., for the appellants.

E. R. Cameron, for the respondent.

ARTHUR v. GRAND TRUNK R. W. CO.

Water and watercourses—Surface water—Diversion of watercourse—Railways—Arbitration and award—Damages—Continuing damage.

If water precipitated from the clouds, in the form of rain or snow, forms for itself a visible course or channel, and is of sufficient volume to be serviceable to the persons through or along

whose lands it flows, it is a watercourse and for its diversion an action will lie.

Beer v. Stroud, 19 O. R. 10, considered.

Where such a watercourse has been diverted by a railway company in constructing their line, without filing maps or giving notice, the landowner injuriously affected has a right of action, and is not limited to an arbitration.

For such diversion the landowner, in the absence of an undertaking by the company to restore the watercourse to its original condition, is entitled to have the damages assessed as for a permanent injury.

Judgment of the Queen's Bench Division, 14 Occ. N. 205, 25 O. R. 37, affirmed.

Osler, Q.C., for the appellants.

Clute, Q.C., and *J. W. Gordon*, for the respondent.

C.P.D.]

TRUMBLE v. HORTIN.

Evidence—Discovery of new evidence—New trial—Discretion—Appeal.

Allowing a new trial on the ground of the discovery of new evidence is a matter of legal discretion, and in a case where a Divisional Court ordered a new trial on the ground of the discovery of new evidence, and this new evidence was merely corroborative of the evidence at the trial, the order was set aside.

Judgment of the Common Pleas Division reversed.

E. D. Armour, Q.C., and *A. H. Clarke*, for the appellant.

W. R. Riddell and *H. E. Rose*, for the respondent.

FERGUSON, J.]

WOOD v. REESOR.

Action—Election of remedies—Inconsistent remedies—Estoppel—Assignments and preferences.

A creditor cannot take the benefit of the consideration for a transfer of goods and at the same time attack the transfer as

fraudulent, and an assignee for the benefit of creditors has no higher right in this respect. Where therefore a creditor suing in the name of the assignee obtained judgment for the payment to him, as part of the debtor's estate, of promissory notes given to the latter for, as was alleged, part of the purchase money of his stock in trade, it was held that it was then too late for the creditor to attack the sale as fraudulent.

On the hearing of the appeal evidence as to the prior action was admitted, and on this evidence and objection then taken the judgment of FERGUSON, J., was set aside without costs here or below.

Moss, Q.C., and *T. M. Higgins*, for the appellants.

Osler, Q.C., and *McBrayne*, for the respondents.

ROSE, J.]

In re CHRISTIE AND TOWN OF TORONTO JUNCTION.

Municipal corporations—Arbitration and award—Increasing award—Evidence—55 V. c. 42, ss. 401, 404.

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A., that in an arbitration within ss. 401 and 404 of the Consolidated Municipal Act, 55 V. c. 42, a Judge, to whom an appeal is taken against the award, cannot, merely on his own understanding of the evidence and on a view of the premises, increase the amount awarded.

Per BURTON and OSLER, J.J.A., that the Judge can deal with the award on the merits, and can increase or reduce the amount or vary the decision as to costs.

In the result the judgment of ROSE, J., was affirmed.

Aylesworth, Q.C., and *Going*, for the appellants.

W. R. Riddell and *A. Cecil Gibson*, for the respondent.

ROBERTSON, J.]

LAND SECURITY COMPANY v. WILSON.

Principal and surety—Novation—Sale of land.

An agreement for sale and purchase of several lots entered

into between the plaintiffs and defendant described the lots by their plan number, and, after providing for payment of the purchase money part in cash and part at times fixed therein with a right of prepayment, contained the words: "Company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The defendant sold and assigned his interest in the agreement to a third person, who made sales of lots and parts of lots, conveyances being made to the purchasers by the plaintiffs, who also gave time to the third person for payment of interest:—

Held, on the evidence, that there was no novation.

Held, also, that the proportion of the purchase price applicable to each lot was to be ascertained by dividing the balance of purchase money, after deducting the cash payment, by the number of lots.

Held, also, that though the plaintiffs had no right to convey parts of lots, the defendant, even if merely a surety, was not wholly released by their doing this, and giving time for payment of interest, but that he was released as to interest in arrear when time was given, and was entitled to credit for the full proportion of purchase money of these lots of which parts had been conveyed.

Judgment of ROBERTSON, J., reversed.

J. K. Kerr, Q.C., and *W. Davidson*, for the appellants.

Robinson, Q.C., and *N. W. Rowell*, for the respondent.

BEATON v. INTELLIGENCER PRINTING COMPANY.

Libel—Pleading—Evidence—Damages—Practice—Rules 399, 573.

Facts intended to be relied on in mitigation of damages in a libel action must be set out in the statement of defence, and unless this is done they cannot be given in evidence.

Rule 399 is inconsistent with Rule 573, and governs.

The defendant may plead in mitigation of damages that the article complained of was published in good faith in the usual course of business.

Judgment of ROBERTSON, J., reversed.

W. R. Riddell, for the appellants.

Lynch-Staunton, for the respondent.

MACMAHON, J.]

CLARKSON v. McMASTER.

Chattel mortgage—Possession—Creditors—Assignments and preferences—55 V. c. 26, s. 4.

The "creditors" against whom, by s. 4 of 55 V. c. 26, taking possession under a defective chattel mortgage is declared to be of no avail, are creditors having executions in the sheriff's hands at the time possession is taken, or simple contract creditors who, at that time, have commenced proceedings on behalf of themselves and other creditors to set aside the mortgage.

An assignee for the general benefit of creditors stands in no better position, and possession taken before the assignment cures all formal defects.

Judgment of MACMAHON, J., reversed.

E. F. B. Johnston, Q.C., and Cutten, for the appellants.

W. Cassels, Q.C., and McBrayne, for the respondents.

STREET, J.]

RAY v. ISBISTER.

Partnership—Promissory notes—Indorser—Res judicata—Practice—Judgment against firm—Action thereon against alleged partner.

An action was brought against a firm as makers and an individual as indorser of a note, and was dismissed as against the indorser, on the ground that he had indorsed at the request of the holders for their accommodation, judgment being granted against the firm.

Held, reversing the judgment of STREET, J., 14 Occ. N. 122, 24 O. R. 497, that the dismissal of this action was an answer to a second action seeking to make the indorser liable as a partner by estoppel.

The practice to be followed in proceeding against an alleged partner on a judgment against the firm, considered.

Osler, Q.C., for the appellant.

Aylesworth, Q.C., for the respondents.

COMMISSIONERS OF QUEEN VICTORIA NIAGARA
FALLS PARK v. COLT.

*Improvements under mistake of title—Compensation—Occupation rent—
Crown—R. S. O. c. 100, s. 30.*

The defendants, being the owners of land adjoining the bank of the Niagara river, built at great expense stairways and elevators and made paths from the top of the bank to the water's edge of the river to enable visitors to descend to see the view, and large sums were received for the use of these facilities. Expensive repairs to the stairways, elevators, and paths were from time to time necessary owing to their exposed position, and the defendants knew that they had no title to the bank, which was vested in the Crown:—

Held, that works of this kind were not lasting improvements within the meaning of s. 32 of R. S. O. c. 100, and that both on this ground and on the ground that the defendants knew they had no title, they could not recover compensation.

Semble, that the section would not affect the Crown, and the title being in the Crown when the improvements were made, the Crown's grantee would take the land free from any lien.

In cases coming within the section, the amount by which the value of the land has been enhanced is to be allowed, and the cost or value of the improvements is not the test.

Held, also, that the defendants were not chargeable with the profits made by them, but only with a fair occupation rent for the land.

Judgment of STREET, J., varied.

Osler, Q.C., and K. H. Cameron, for the appellants.

Moss, Q.C., and W. Barwick, for the respondents.

DRAINAGE REFEREE.]

In re TOWNSHIP OF MERSEA AND TOWNSHIP OF
ROCHESTER.

In re TOWNSHIP OF GOSFIELD NORTH AND TOWN-
SHIP OF ROCHESTER.

*Drainage—Municipal corporations—Drainage Trials Act, 54 V. c. 51—55 V.
c. 42, ss. 583, 584, 598.*

Drainage works in which several minor municipalities were

interested were done by the county. Subsequently, repairs being necessary, one of the minor municipalities, having obtained a report as to the expenditure required, passed a by-law affirming the necessity of repairing the drain, adopting the report, providing for its own share of the cost, and charging the other minor municipalities with portions of the cost :—

Held, per HAGARTY, C. J.O., and MACLENNAN, J.A., that the Drainage Referee had jurisdiction to entertain an appeal by the minor municipalities against this by-law and to declare it to be invalid.

Per BURTON and OSLER, JJ.A., that he had no jurisdiction, and that in any event an appeal to him was unnecessary, the by-law being of no avail as far as the minor municipalities were concerned.

In the result the Referee's judgment holding that he had jurisdiction was affirmed.

M. Wilson, Q.C., and J. B. Rankin, for the appellants.

A. H. Clarke and M. Cowan, for the respondents.

C. C. ESSEX.]

THOMSON v. EEDE.

County Court—Jurisdiction—Guaranty—Liquidated amount.

The County Court has no jurisdiction to entertain an action for more than \$200 on a guaranty, in general terms, of payment of the price of goods, there being no liquidation or ascertainment of the amount as between the vendor and the guarantor, the liquidation or ascertainment by the debtor not binding the latter.

Judgment of the County Court of Essex affirmed.

W. R. Riddell and H. E. Rose, for the appellant.

A. H. Clarke, for the respondent.

C. C. J. PETERBOROUGH.]

In re BURNHAM.

Water and watercourses—Water privileges—R. S. O. c. 119.

There can be no interference whatever, under the Act respecting water privileges, R. S. O. c. 119, with an occupied mill privilege, and the County Court Judge has no jurisdiction to authorize works that would affect the mode in which the occupied mill privilege has, up to the time of the application, been used.

An order made under the Act must state specifically the height of the authorized dam.

Judgment of the Judge of the County Court of Peterborough reversed.

W. Cassels Q.C., and *Edwards*, for the appellant.

W. R. Meredith, Q.C., and *R. E. Wood*, for the respondents.

SURR. Ct. BRUCE.]

[OSLER, J.A., 7TH JANUARY, 1895.]

In re MACLAREN.

Probate—Ancillary probate—Will—Surrogate Court—51 V. c. 9.

A will executed before two notaries in accordance with the law of the Province of Quebec, not acted upon or proved in any way before any Court of that Province, is not within the Act respecting ancillary probates and letters of administration, 51 V. c. 9.

Judgment of the Surrogate Court of Bruce affirmed.

W. E. Middleton, for the appellant.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 7TH DECEMBER, 1894.]

In re CUMMINGS AND COUNTY OF CARLETON.

Prohibition—Arbitration and award—Municipal corporations—Bridges—Approaches—Lands injuriously affected—Compensation—Liability—City and county—55 V. c. 42, ss. 391, 530, 532, 535.

Where a bridge over a river, which formed the boundary line between a city and a township, within a county, was erected by

the councils of the city and county jointly, and in raising the approaches on the township side, certain lands were injuriously affected, for which the owner claimed compensation :—

Held, having regard to ss. 580, 582, and 585 of the Municipal Act, 55 V. c. 42, that the county, and the county alone, could be compelled to arbitration in respect of such compensation.

Pratt v. City of Stratford, 16 A. R. 5, followed.

Held, also, that s. 391 did not apply to permit an arbitration between the land-owner and the city and county together, nor was such an arbitration otherwise provided for by law.

Prohibition against proceeding with such an arbitration.

Decision of *Boyd, C.*, 14 Occ. N. 451, 25 O. R. 607, reversed.

Moss, Q.C., for the city of Ottawa.

H. M. Mowat, for the county of Carleton.

Chrysler, Q.C., and *W. M. Douglas*, for Cummings.

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NELLIGAN v. NELLIGAN.

Alimony—R. S. O. c. 44, s. 29—Restitution of conjugal rights—Cohabitation.

The provision, found in R. S. O. c. 44, s. 29, giving jurisdiction to grant alimony to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights, first became the law of this Province on 10th June, 1857, at which time the jurisdiction over suits for the restitution of conjugal rights was exerciseable by the Ecclesiastical Court in England. That Court could interfere in the way of restitution only where matrimonial cohabitation was suspended, that is, where either party refused to live with the other without sufficient cause. To a suit for restitution of conjugal rights there was no bar or legal opposition except cruelty or adultery on the part of the promoter; and the single duty which the Court could enforce by its decree in such a suit was that of married persons living together.

And upon the evidence in this case the husband refused to live with his wife without sufficient cause, and she was therefore entitled to alimony.

Orde, for the plaintiff.

Chrysler, Q.C., for the defendant.

[19TH DECEMBER, 1894.]

ADAMS v. ANNETT.

Arrest—Order for—Discharge—Costs—Terms—No action to be brought.

Where the defendant in his notice of motion to set aside an order for his arrest and for his discharge, asked for costs, and an order was made in his favour with costs :—

Held, that the Judge making the order had power to impose the term that the defendant should be restrained from bringing any action.

Review of the English authorities.

Per FALCONBRIDGE, J.—Following *Scane v. Coffey*, 15 P. R. 112, the term should be imposed only where the plaintiff has been frank and open in his application for the order for arrest, and had reasonable grounds for the statements he laid before the Judge.

C. J. Holman, for the plaintiffs.

Aylesworth, Q.C., for the defendant.

In re LONDON MUTUAL FIRE INSURANCE COMPANY OF CANADA v. McFARLANE.

Prohibition—Division Court—Right to jury—Tort—Contract—Particulars of claim—R. S. O. c. 51, ss. 94, 154.

In an action in a Division Court to recover \$30, the plaintiffs set out their claim in the particulars annexed to the summons, stating that they had paid the defendants \$30 for loss of goods insured against fire; that the defendants in their application covenanted that there was no other insurance on the property,

and the policy issued was conditional on the truth of the statements in the application, but at the time of the application and the loss, the property was covered by a policy in another company, which was then and at the time of the payment of the \$30 unknown to the plaintiffs; that the plaintiffs' policy became null and void, and was no longer binding on them, by reason of the prior insurance; that the defendants falsely and fraudulently made a statutory declaration that there was no insurance on the property other than that of the plaintiffs, in full reliance upon which the plaintiffs paid the \$30.

Held, having regard to s. 94 of the Division Courts Act, R. S. O. c. 51, that the nature of the action was to be determined by these particulars, and from them it appeared that it was in tort, and not in contract; and, as the sum sought to be recovered exceeded \$20, either party was entitled under s. 154 to require a jury.

And the County Judge having set aside the defendants' notice requiring a jury, an order was made prohibiting him from proceeding in or trying the action.

W. E. Middleton, for the plaintiffs.

W. H. Blake, for the defendants.

In re CLARK v. BARBER.

*Prohibition—Division Court—Money payable by instalments with interest—
Dividing cause of action—R. S. O. c. 51, s. 77.*

Under an agreement for sale of land, the balance of the purchase money was payable by instalments with interest at a named rate half-yearly; and at a time when three of the instalments, amounting to \$70, and three years' taxes were overdue, an action was commenced in a Division Court for the arrears of interest and two years' taxes, \$95.80.

Held, reversing the decision of Boyd, C., 14 Osc. N. 401, 25 O. R. 253, that the plaintiffs could have recovered all the purchase money and interest due when the action was begun under one count in a Superior Court; and therefore there was a

dividing of their cause of action within the meaning of s. 77 of the Division Courts Act, R. S. O. c. 51.

Re Gordon v. O'Brien, 11 P. R. 287, approved and followed.

Public School Trustees of Nottawasaga v. Cooper, 15 A. R. 810, distinguished.

R. M. Macdonald, for the plaintiffs.

R. B. Beaumont, for the defendant.

HOLLENDER v. FFOULKES.

Foreign judgment—Action on—Defence—False affidavit—Fraud—Court of Appeal in England—Decision of—Authority—Practice—Reply—Demurrer—Rules 403, 1322.

To an action on a foreign judgment the defendant pleaded that the order for such judgment was obtained upon a false affidavit, and that the plaintiffs obtained the judgment by fraudulently concealing from the Court the true nature of the transactions between them and the defendant.

Held, a good defence.

Abouloff v. Oppenheimer, 10 Q. B. D. 295, and *Vadala v. Lawes*, 25 Q. B. D. 810, followed.

Woodruff v. McLellan, 14 A. R. 242, not followed.

A colonial Court should follow the decisions of the Court of Appeal in England.

Trimble v. Hill, 5 App. Cas. 842, followed.

Macdonald v. McDonald, 11 O. R. 187, and *McDonald v. Elliott*, 12 O. R. 98, not followed.

To the above defence, the plaintiffs, after the coming into force of Rule 1322, replied that the defendant was precluded by law from raising any question as to the validity of the foreign judgment which might have been raised by way of appeal in the foreign forum.

Held, that this replication was equivalent to a demurrer under the former practice, and was an admission of the truth of the facts stated in the defence; and to such a replication Rule 403 had no application.

McBrayne, for the plaintiffs.

Bartram, for the defendant.

HAIST v. GRAND TRUNK R. W. CO.

Negligence—Railways—Contributory negligence—Settlement before action—Payment—Receipt—Evidence—Accord and satisfaction—Release—Estoppel—Non-suit.

In an action for damages for negligence whereby the plaintiff was injured in alighting from a train, the defendants denied negligence and pleaded contributory negligence, and also a payment of \$10 to the plaintiff before action and a receipt in writing signed by him therefor, "in lieu of all claims I might have against said company on account of an injury received * * by reason of my stepping off a train * * ; such act being of my own account, and not in consequence of any negligence or otherwise on behalf of such railway company or any of its employees." The plaintiff replied that if he signed the receipt, he was induced to do so by fraud and undue influence.

Held, that the issue raised by the document was not a distinct issue, but rather a matter of evidence upon the issues of negligence and contributory negligence, and should have been submitted to the jury and not separately tried by the Judge.

Johnson v. Grand Trunk R. W. Co., 25 O. R. 64, 21 A. R. 408, distinguished.

The document would not support a plea of accord and satisfaction, nor of release, nor did it operate by way of estoppel.

It was cogent evidence of the absence of negligence on the defendants' part and of contributory negligence on the plaintiff's part; but, there being evidence of negligence on the defendants' part, the case could not have been withdrawn from the jury.

Judgment of STREET, J., reversed.

Aylesworth, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendants.

SCHMIDT v. TOWN OF BERLIN.

Negligence—Municipal corporations—Public park—Licensee—Knowledge.

A municipal corporation, owner of a public park and building therein, is not liable to a mere licensee for personal injuries

sustained owing to want of repair of the building, at all events where knowledge of the want of repair is not shown.

King, Q.C., for the plaintiffs.

W. H. P. Clement, for the defendants.

REGINA v. CUNERTY.

Justice of the peace—Summary conviction—Sale of intoxicating liquors—Quantity—R. S. O. c. 194, s. 2, s.-s. 3—Finding of magistrate—Power to Review—Certiorari.

The defendant, the holder of a shop license under the Liquor License Act, R. S. O. c. 194, was convicted by a magistrate for selling liquor in less quantity than three half pints, contrary to s. 2, s.-s. 3. The evidence showed a sale of a bottle of ale and a flask of brandy each containing less than three half pints, the two together containing more than three half pints.

Upon appeal from an order refusing a *certiorari* :—

Held, that it was within the jurisdiction of the magistrate to determine as a matter of fact whether the defendant had sold liquor in less quantity than three half pints, and if a *certiorari* were granted, the Court would have no power, upon a motion to quash the conviction, to review the magistrate's decision.

Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417, followed.

J. R. Cartwright, Q.C., for the Crown.

Haverson, for the defendant.

PORT ELGIN PUBLIC SCHOOL BOARD v. EBY.

Principal and surety—Bond—Condition—Breach—Demand—Executors and administrators—Liability of sureties.

The plaintiffs' treasurer, who died before action, and two sureties on his behalf executed a joint and several bond in favour of the plaintiffs, conditioned that he should receive, safely keep, and faithfully disburse all school moneys collected,

and deliver up to the plaintiffs, *on demand*, all moneys not paid out.

Held, that there could be no recovery against the sureties upon the bond without showing a demand personally made upon the treasurer; and a demand upon the administrators of his estate was of no avail.

Shepley, Q.C., for the plaintiffs.

Shaw, Q.C., for the defendants Eby and Carroll.

D. Armour, for the defendants the Trusts Corporation of Ontario.

DOLEN v. METROPOLITAN LIFE INSURANCE CO.

Life insurance—Policy—Interest and rights of insured and of beneficiaries—Assignment of policy to secure debt—Judgment for debt, effect of—Loss of assignment—Secondary evidence—Affidavits—Rule 585—Costs.

Where an insurance was effected upon the life of a person for the benefit of her father, brothers, and sisters, the plaintiffs:—

Held, that the beneficial interest in the policy, as soon as it was issued, vested in the plaintiffs, and the contract of the insurers being to pay them the moneys payable under the policy, the insured could not by any act of hers deprive them of the interest so vested in them or of their right to call upon the insurers for payment; and an assignment made by her to a stranger to secure a debt had no effect upon such interest or right of the plaintiffs; but an assignment made by the father to such stranger was effectual to transfer his individual beneficial interest and right; and the assignee, under the circumstances in evidence, became the mortgagee of such interest and right; and the recovery of a judgment by the assignee against the father for the amount of the debt did not prejudicially affect the security.

It having been shown at the trial that an assignment of the policy had been made, but it being doubtful whether sufficient evidence of its loss had been given to warrant the admission of secondary evidence of its contents, the Court allowed further

evidence of such loss to be given by affidavit, under Rule 585 ; and, such further evidence being satisfactory:—

Held, that the trial Judge was right in finding that an assignment according to the form in use by the insurers, and produced at the trial, had been executed by the insured and her father.

Consideration of question of costs.

M. G. Cameron and *W. J. Elliott*, for the plaintiffs.

Fair, for the defendant *Lamb*.

[26TH DECEMBER, 1894.]

SHANNON SHINGLE MANUFACTURING CO. v. CITY
OF TORONTO.

Equitable assignment—Chose in action—Verbal arrangement—Notice—Priorities.

A contractor who had certain contracts with a city corporation, in 1888, by writing, assigned to one who supplied him with funds to perform the work under the contracts, all moneys due or coming due thereunder, and lodged the writing with the corporation. The assignor at this time expected to enter into other contracts with the corporation, and subsequently did so ; and at this time and prior to it, a standing arrangement, not evidenced by any writing, existed between him and the assignee by which the latter was to supply money and material to the former, as security for which the former was to give the latter an order for all moneys coming to him from the corporation upon all his contracts, and this arrangement was to continue until he saw fit to stop it. The corporation had no notice of this arrangement, but they treated the writing as applicable to future contracts and made payments to the assignee, with the assent of the assignor, until they received notice of other assignments of portions of the moneys.

Held, that, although the written assignment applied only to the contracts in force at its date, the verbal arrangement was a good equitable assignment of all moneys which became due

under future contracts; but, in the absence of notice to the corporation of the verbal arrangement, the other assignees, who gave the corporation notice, were entitled to priority as to moneys due under future contracts at the time they gave such notice.

Dearle v. Hall, 3 Russ. 1, 48, followed.

Moss, Q.C., for Robert Carroll.

Coatsworth, for T. Tomlinson & Son.

W. H. Garvey, for the plaintiffs.

W. R. Smyth, for J. J. Booth.

[ARMOUR, C.J., 31ST JANUARY, 1895.]

In re SOLICITOR.

Solicitor—Striking off roll—Client's money—Costs of taxation and motion.

Ordered that a solicitor should be struck off the roll unless by a named day he should pay an amount found by the report of a taxing officer to be in his hands, the moneys of a client, together with the costs of the taxation, and of the motion to strike him off the roll.

Walter Read, for the client.

Tremear, for the solicitor.

[MEREDITH, C.J., 24TH NOVEMBER, 1894.]

KOCH v. HEISEY.

Will—Legacy to widow—Right to annual specific sum—Children of deceased child—Right to their parent's share.

The testator by his will bequeathed to his wife \$150 a year, payable half yearly out of the rent of his farm, until the sale thereof, which was to be three years after his death, when she was to be paid the interest on \$2,500 at six per cent., or the \$150. On the sale the purchaser was to pay not less than \$8,000 in cash, and the balance as the executors might deem most beneficial. The sum of \$2,500 was to be left on mortgage

or invested by the executors at interest, payable half yearly to the widow during her lifetime or widowhood, and such provision was to be in lieu of dower. Legacies of \$500 were given to each of testator's twelve children, one of whom, M., was dead at the date of the will, to be paid out of the proceeds of the sale of the real estate. J., one of the sons, was to have his \$500, or a part of it, out of the first sum realized from the sale. The residue of the deceased daughter's legacy was to be placed at interest and divided equally between her surviving children on their attaining twenty-one years. In case any of the testator's children should die before receiving their full shares and leaving issue, the deceased child's share was to be divided equally among his or her children, but if they should die without issue, his or her share should be divided equally among his or her surviving brothers and sisters. All the residue of the estate he gave to his children and their issue as aforesaid provided for, to be divided equally among them from time to time as the money should become payable.

Held, that there was a clear and distinct gift to the widow of \$150 a year, and not merely of the annual interest derivable from the investment of the \$2,500, which she was entitled to have paid her in priority to the other legatees.

Held, also, that M.'s children were entitled to share in the residue of the estate.

G. W. Holmes, for the plaintiff.

T. M. Higgins, for the defendants Selina Heisey and Albert Heisey.

J. Hoskin, Q.C., for the infant defendants.

James McCullough, for the defendant Jacob Heisey.

W. D. Gregory, for the defendant Campbell.

J. W. McCullough, for the other defendants.

[ROSE, J., 5TH AND 15TH OCTOBER, 1894.]

CULLERTON v. MILLER.

Water and watercourses—Navigable waters—Ice—Right of free passage over—Action for declaration of right—Damages—Loss of business.

The defendant, being the owner of certain water lots upon a lake front, subject to a reservation in favour of the Crown of

free passage over all navigable waters thereon, refused to allow the plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless the plaintiff paid toll, which he refused to do.

Held, that the plaintiff had the right without payment to cross the defendant's lot, whether the water upon it was fluid or frozen; and, having a cause of complaint, and a right of action for his personal loss, he was entitled to come to the Court for a declaration of right.

Gooderham v. City of Toronto, 21 O. R. 120, 19 A. R. 64, and *City of Toronto v. Lorsch*, 24 O. R. 229, followed.

Held, also, that the defendant was liable for such reasonable damages as flowed directly from the wrong done by his refusal; but, as he had acted without malice and under a *bona fide* mistake as to his rights, he was not liable for the plaintiff's loss of business consequent on his failure to ship the ice.

L. V. McBrady, for the plaintiff.

William Macdonald, for the defendant.

[MACMAHON, J., 1ST OCTOBER, 1894.]

MARTIN v. CHANDLER.

Will—Failure of issue—Meaning of—R. S. O. c. 109, s. 32—Life estate—Estate tail—Residue.

By the second clause of his will the testator devised to his son W. the use during his lifetime of certain land in C., but should he die without issue, then it was to be equally divided between two named grandsons; and by the tenth clause, on the death of the testator's widow, all his lands in C., and all other property not bequeathed by his will, were to be equally divided amongst all his children, *i.e.*, his executors were to sell and divide the proceeds amongst the children. W. died leaving issue. The testator's widow was also dead, her death occurring prior to W.'s.

Held, that, under R. S. O. c. 109, s. 32, the failure of issue referred to in the second clause was a failure during W.'s

lifetime or at his death and not an indefinite failure; that by virtue of the tenth clause W. therefore took a life estate and not an estate tail by implication; and that on the termination of W.'s life estate, the lands fell in and formed part of the residue.

Aylesworth, Q.C., for the plaintiff.

L. V. McBrady, for the widow of William Paul Quinn Chandler.

C. J. Holman, for the executors and Marcella Anderson.

J. Hoskin, Q.C., for the infant defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 10TH JANUARY, 1895.]

JURY v. JURY.

Arrest—Ex parte order for—Setting aside—Jurisdiction—Rules 536, 1051—Sheriff.

Rule 536 does not apply to cases of *ex parte* orders for arrest, which are specially provided for by Rule 1051; and a County Court Judge has no jurisdiction to set aside his own order to arrest.

Where an order for arrest has been acted on by the sheriff, it should not be disturbed.

W. H. Bartram, for the plaintiff.

No one appeared for the defendant.

HOGABOOM v. GRAYDON.

Bills of sale and chattel mortgages—Transfer from husband to wife—“Actual and continued change of possession”—R. S. O. c. 125, s. 1—55 V. c. 26, s. 3.

Held, that if a transaction of sale takes place between a married woman and her husband as to furniture, etc., if she and her husband continue to live together as before, her right must

be manifested and protected by a registered instrument if she wishes to hold as against his creditors, for there cannot be said to be in that case such an actual and continued change of possession as is required by the above enactments.

W. R. Riddell, for the plaintiff.

Allan Cassels, for the defendant.

MOLSONS BANK v. HEILIG.

Principal and surety—Security held by creditors—Release of same without consent of surety—Rights of surety—Judgment.

The plaintiffs sued the defendant as indorser of a promissory note made by a customer, a number of whose notes, indorsed by various persons, they held, and also a mortgage from the customer on certain lands to secure his general indebtedness. Before this action the plaintiffs had released and discharged certain of the lands comprised in the mortgage, without the consent of the defendant.

Held, varying the decision of ROBERTSON, J., 14 Occ. N. 805, 25 O. R. 503, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make the plaintiffs account for their dealings with the mortgaged property held for the benefit of the indorsers, when that security had answered its purpose, or the debt had been paid by the sureties, or when, in any other event, the application of the moneys from the security could be properly ascertained.

Crerar, Q.C., and *P. D. Crerar*, for the plaintiffs.

J. W. Nesbitt, Q.C., for the defendant.

STRIDE v. DIAMOND GLASS COMPANY.

Master and servant—Employer's liability—Defect in "way"—Public street—Workmen's Compensation Act, 55 V. c. 80, ss. 3, 6.

The defendants' factory was built fronting on and close to a public street, which was fourteen feet wide at the place, but with a steep declivity on the other side. One of their workmen was

employed at the time of the accident in unloading straw off a waggon into the defendants' premises through an aperture facing the above portion of the street. He lost his balance, fell off the load of straw and down the declivity, and was killed. It was contended that if there had been a fence on the side of the street where the declivity was, the accident would not have happened.

Held, that the defendants were not liable.

The defective condition of a public street used by an employer in connection with his business is not a "way used in the business of the employer," within the meaning of the Workmen's Compensation Act, 55 V. c. 80, ss. 8 and 6. The defect, to render the employer liable, must be on his premises or on a place over which he has control; that could be made right by the employer, but this is not so in regard to a public street, upon which the employer had no right to construct a fence or barrier as here suggested.

Carscallen, Q.C., for the plaintiff.

E. Martin, Q.C., for the defendants.

STARK v. REID.

*Mortgage—Redemption—Right to assignment—Right to reconveyance—
R. S. O. c. 102, s. 2—Tacking.*

The plaintiffs, being mortgagees of certain lands, afterwards acquired, by transfer, a second mortgage on the same property, and now sued the covenantors in the former mortgage, who demanded, upon payment of the amount of the former mortgage, a reconveyance subject to equities of redemption existing in other parties.

Held, that the defendants were entitled to this, and that the plaintiffs could not tack the amount of the second mortgage to the first, and require payment of both.

Kinnaird v. Trollope, 39 Ch. D. 636, followed.

Per Boyd, C.—When the mortgagor, who pays under his covenant, has assigned the equity of redemption, the form of conveyance should be of the legal estate to the mortgagor, who

pays subject to the equity of redemption of his assignee, and the mortgage should itself be handed over for securing him in the amount paid upon it.

Moss, Q.C., for the plaintiffs.

Coatsworth and F. E. Hodgins, for the defendants.

[BOYD, C., 12TH DECEMBER, 1894.]

KNARR v. BRICKER.

Reference—Report—Drawing—Settling—Notice.

A judicial officer charged with a reference should himself draw his report, and not delegate it to the solicitor for the successful party. Both parties should be given equal facilities to know the result and be present at the drawing or settling of the report.

J. P. Mabey and R. T. Harding, for the plaintiff.

E. P. Clement and W. H. P. Clement, for the defendants.

[MEREDITH, C.J., 19TH NOVEMBER, 1894.]

ROBERTS v. DONOVAN.

Contempt of Court—Imprisonment for—Judgment directing discharge of mortgage—Failure to obey—Liability to commitment—Married woman.

In accordance with the decision of the Court of Appeal, noted 14 Occ. N. 2, and reported *sub nom. Berry v. Donovan*, 21 A. R. 14, the judgment directing the defendants to discharge a mortgage within a limited time was served on them with a notice indorsed thereon that the failure to comply with such demand, after the expiration of a month from the service thereof, would render them liable to commitment for contempt.

On a motion therefor after the lapse of the month, the judgment not having been obeyed, an order for commitment was made, which included both defendants, one of whom was a married woman.

Remarks as to the policy of this method of enforcing a judgment, but that this was for the legislature and not for the Courts to deal with.

Moss, Q.C., for the plaintiff.

The defendant *J. A. Donovan*, in person, and for the defendant *Julia Donovan*.

[10TH DECEMBER, 1894.]

STEELE v. GROVER.

Will—Bequest to poor of county—Town detached from county for municipal purposes only—Right of residents to participation.

The testatrix by her will gave the residue of her estate in trust for the benefit of the sober and industrious but destitute and needy widows and orphans of a certain county, who must have been *bona fide* residents of such county before becoming destitute or needy. A town in the county originally formed part thereof for all purposes, but was in 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only.

Held, that residents of the town coming within the class referred to in the bequest were included therein.

The various statutes passed from time to time discussed.

E. T. Malone, for the plaintiff.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

Robinson, Q.C., and *Stratton*, for the county.

F. B. Edwards, for the town.

[12TH DECEMBER, 1894.]

KINSEY v. KINSEY.

Will—Bequest to agricultural society—Restrictions against secret societies—Validity — Impure personalty — Bequest to promote free-thought — Validity.

By one of the provisions of a will the testator directed his executors to invest \$2,000 and pay over the yearly interest to an

agricultural society, incorporated under R. S. O. 1877 c. 35, under which it was authorized to acquire and hold real estate, but not to take by devise, to be applied as a premium for the best results in a specified mode of agriculture, but with a provision that all competitors should declare that they were neither Freemasons, Orangemen, nor Oddfellows ; and, in case of neglect to comply with the conditions, the executors should apply such yearly interest in procuring lectures against Freemasonry and other secret societies. The legacy was payable out of a mixed fund consisting in part of impure personalty.

Held, that the society came under the Mortmain Acts, and therefore, so far as the bequest consisted of impure personalty, it was void.

Held, also, that the society was not bound to expend annually the interest received by it, but might apply the money received from time to time as it might deem best so long as it acted in good faith and did not divert the money from the purpose directed by the testator.

The will also directed the executors to invest the residue of the estate and to apply the annual interest therefrom in such way and manner as the executors should deem expedient and proper for the promotion of free-thought and free-speech in the province of Ontario.

Held, that this bequest was void as opposed to Christianity.

Pringle v. Corporation of Napanee, 43 U. C. R. 285, followed.

Haines, for the plaintiff.

W. R. Riddell, for Phoebe M. Howell.

A. J. Boyd, for the official guardian.

Langton, Q.C., for the agricultural society.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

[ROSE, J., 10TH JANUARY, 1895.]

JOHNSON v. JONES AND TOBICOE.

*Indians—Capacity to make a will—Indian Act, R. S. C. c. 43, s. 20—
Superintendent General.*

Held, that an Indian, male or female, may make a will, and may by such will dispose of any lands or goods or chattels except

as far as such rights may be interfered with by the Indian Act or other statute.

Held, further, that in the case of the will of an Indian widow, where the property bequeathed was personal property, there being nothing in the Indian Act to restrict or interfere with her right to dispose of the same either by act *inter vivos* or by will, the will was valid and sufficient to pass the property named in it.

Quære, however, whether the last part of s. 20 of the Indian Act does not leave all questions arising in reference to the distribution of the property of a deceased Indian, male or female, to the Superintendent General, so that his decision, and not that of the Court, should determine such questions.

T. A. Snider and *A. T. Thompson*, for the plaintiff.

E. Furlong, for the defendant Jones.

S. F. Washington, for the defendant Tobicoe.

[STREET, J., 19TH NOVEMBER, 1894.]

OLIVER v. LOCKIE.

Water and watercourses—Easement—Dominant tenement—Servient tenement—Defined channel—Prescription—R. S. O. c. 111, s. 35.

The rule is that when an owner creates an artificial water-course discharging surplus water upon a neighbour's land, he obtains at the expiration of the statutory period a right to continue to discharge it, but the neighbour acquires no right to insist upon the continuance of the flow. The easement arises for the benefit of the dominant tenement. The owner of such a servient tenement is not a "person claiming right thereto" within s. 35 of R. S. O. c. 111. A defined channel is an essential part of a stream.

Ennor v. Barwell, 2 Giff. 410, distinguished.

Under the circumstances of this case :—

Held, that the owner of the servient tenement could not interfere with the user by the owner of the dominant tenement of water rising on her land.

Monro Grier, for the plaintiff.

DuVernet and *Millican*, for the defendant.

[29TH DECEMBER, 1894.]

In re TRUSTS CORPORATION OF ONTARIO AND
BOEHMER.

Vendor and purchaser—Contract to buy land from administrators—Judgment against intestate—Execution issued after death—Ex parte order for—Incumbrance—Practice.

The administrators of a deceased person contracted to sell some of his lands. Subsequent to this contract, one who had obtained a judgment against the deceased in his lifetime obtained *ex parte* an order for leave to issue execution against the estate in the hands of the administrators, and accordingly issued and placed in the sheriff's hands a *fi. fa.* lands.

Held, that the execution formed no charge or incumbrance on the lands contracted to be sold.

It is wrong to order the issue of execution against goods or lands of a testator or intestate in the hands of an executor or administrator without giving the latter an opportunity to show cause.

F. E. Hodgins, for the petitioners, the vendors.

No one appeared for the purchaser.

[12TH JANUARY, 1895.]

PATTEN v. LAIDLAW.

Money in Court—Subsequent order for costs—Claim for payment out—Mechanics' liens.

By the report of the Master in a mechanic's lien action a certain sum of money was found due from the owner to the contractor, and the former was ordered to pay the amount into Court, which she did. The contractor then appealed from the report, but without success, and he was ordered to pay the costs of the appeal to the owner. She asked that these costs might be paid out of the moneys paid by her into Court, upon the ground that otherwise she would lose them, owing to the contractor's inability to pay.

Held, that the order could not be granted.

The applicant no longer owned anything. The payment into Court was a discharge of her liability, and the money so paid in was no longer hers but was in Court for distribution according to the findings of the report. She therefore had no money in her hands and no right to the money in Court, and must look to the contractor personally for her costs of the appeal.

O'Heir, for the appellant.

Logie, for the other defendants.

No one appeared for the plaintiff.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 21ST DECEMBER, 1894.]

REGINA v. SLATTERY.

Liquor License Act—Having liquor for sale—Summary conviction—Manager of club—R. S. O. c. 194, s. 50.

Section 50 of the Liquor License Act, R. S. O. c. 194, which forbids the keeping or having in any house, etc., any liquors for the purpose of selling, etc., by any person unless duly licensed thereto under the provisions of the Act, does not justify a conviction of the manager of a club incorporated under the Ontario Joint Stock Companies' Letters Patent Act, who has the charge or control of the liquor merely in his capacity of manager; the act of keeping being that of the club, and not of the manager.

DuVernet, for the defendant.

J. R. Cartwright, Q.C., for the Crown.

H. L. Drayton, for the prosecutor.

[THE DIVISIONAL COURT, 5TH DECEMBER, 1894.]

VILLAGE OF LONDON WEST v. BARTRAM.

Municipal corporation—Removal of clerk—Resolution of council.

The removal of a clerk of a municipal corporation may be by a resolution of council, it not being essential that a by-law should be passed for such purpose.

Vernon v. Corporation of Smith's Falls, 21 O. R. 331, followed.

E. R. Camerom, for the plaintiffs.

The defendant, in person.

[21ST DECEMBER, 1894.]

CONFEDERATION LIFE ASSOCIATION v. WILLSON.

Married woman—Conveyance from husband to wife—Separate estate.

A husband, married in 1863, granted, in 1874, certain land to his wife, to her sole and separate use, upon which mortgages were subsequently made by the wife and the husband, containing a covenant for payment of the mortgage money, the husband at the time declaring that the land was his wife's and that she had been in possession thereof since the date of the deed. No question was raised as to the wife's right to the property until some years subsequently, and after she had re-conveyed to her husband, when it was claimed that it had never been intended to convey the property to the wife as her separate estate.

Held, that the effect of the conveyance was to vest the land in the wife as her separate estate so as to enable her to make the mortgages on it, and to enter into the covenants contained therein.

Snow and A. E. Bull, for the plaintiffs.

G. G. Mills, for the defendant.

WILKINSON v. WILSON.

*Deed—Construction of—Provision for occupation of bed-room in farm-house—
Right of occupation—Duration—Forfeiture.*

J. W. conveyed to his son A. W. certain farm lands, but subject to a life estate to himself therein, and subject also, amongst other things, to the use by another son, the plaintiff, of

a bed, bedroom, and bedding in the dwelling-house on the farm, and to board so long as he should remain a resident on the farm.

Held, that the plaintiff took no estate under the deed, but merely the use, after the termination of the father's life estate, of the bedroom, &c., and board while resident on the land; that no period was fixed for such occupation; and therefore no forfeiture was created by his not occupying for any period.

W. M. Douglas, for the plaintiff.

Neville, for the defendant.

COLE v. HUBBLE.

Action for carnal connection by force—Previous acquittal for rape not a bar—Amendment.

In an action for enticing away and having carnal knowledge of the plaintiff's daughter, the plaintiff, against the protest of the defendants' counsel, was allowed at the close of the case to amend by setting up, as an alternative cause of action, the enticing away of the daughter and having connection with her by force and against her will, and consequent loss of service. No application was made by the defendants to put in further evidence, nor any suggestion made that they were in any way prejudiced by the amendment.

Held, that the amendment was properly allowed.

Held, also, that the fact of the defendants having being previously acquitted on an indictment for rape was not a bar to the action.

Mikel, for the plaintiff.

Clute, Q.C., for the defendants.

In re REID v. GRAHAM BROTHERS.

Prohibition—Division Court—Judgment summons—Examination—Refusal of evidence—Partnership—Judgment against firm—Parties—Members of firm—Commitment—Contempt of Court—Execution.

After judgment had been obtained in a Division Court action against a partnership firm consisting of two members, one of

whom only had been served with the summons, judgment summonses were issued against both the defendants, and on their non-attendance thereon, orders of committal against them were issued.

The order and decision of Boyd, C., 14 Occ. N. 452, 25 O. R. 573, refusing prohibition, was affirmed as against the partner who had been personally served with original process but reversed as against the partner who had not been served, he not being a debtor against whom execution could issue, and so not liable to committal, such committal not being process for contempt, but in the nature of execution or limited or qualified execution.

D. Armour, for the plaintiff.

Neville, for the defendants.

McDERMOTT v. TRACHSELL.

Assessment and taxes—Demand of payment—Delivery of tax bill—By-law.

The mere delivery to a ratepayer of a statement of taxes due is not sufficient evidence of the demand required to be made for the payment of such taxes, unless a by-law has been passed providing that such delivery shall be sufficient for the purpose.

J. P. Mabee, for the plaintiff.

Idington, Q.C., for the defendant.

HEWIT v. CANE.

Malicious prosecution—Evidence—Record of acquittal—Necessity for production of—Admissions on examination for discovery.

In an action for malicious prosecution, the indictment, with an indorsement thereon of the acquittal of the plaintiff on the criminal charge laid against him, was produced by the Clerk of the Court, having been sent to him by the Registrar of the Queen's Bench Division, to whom the indictment had been

returned, and which he had been subpoenaed by the plaintiff to produce, the Court being informed that the Attorney-General had refused his *fiat* to enable a record of acquittal to be made up. The defendant's counsel objected to the admission of the indictment, and its admission was refused.

Held, that the indictment so indorsed and produced was not, under the circumstances, sufficient evidence of the termination of the prosecution, but that the formal record of acquittal should have been produced; and that such record, or a copy thereof, could not be obtained without a *fiat* of the Attorney-General.

Quære, whether the termination of such prosecution can be proved by admissions made by the defendant on his examination for discovery.

Steers, for the plaintiff.

Lount, Q.C., for the defendant.

BAECHLER v. ANDREWS.

Malicious prosecution—Evidence—Production of original record of acquittal—Sufficiency of—Absence of fiat of Attorney-General.

Where, in an action for malicious prosecution, in proof of the determination in the plaintiff's favour of the criminal proceedings in respect of which the action is brought, a record of acquittal, unobjectionable in form, is produced at the trial by the officer of the Court in whose custody it is, though without a *fiat* of the Attorney-General, it is properly receivable in evidence.

Aylesworth, Q.C., for the plaintiff.

Garrow, Q.C., for the defendant.

WEEGAR v. GRAND TRUNK R. W. CO.

Sheriff—Poundage—Allowance in lieu of—Seizure of goods—Withdrawal of man in possession before sale—Execution superseded—Rule 1233—Amount of allowance—Discretion.

A sheriff made a seizure under a *fi. fa.* against the goods of the defendants, but, learning that they were about to appeal, of

his own motion, and for the purpose of saving expense to the parties, withdrew his officer in possession, and, the appeal having been subsequently brought, the execution was superseded. The appeal was dismissed, and the judgment debt and costs were afterwards settled by arrangement between the parties.

Held, that the sheriff had not so withdrawn from the seizure as to disentitle him to poundage or an allowance in lieu thereof, and that, notwithstanding the superseding of the execution, he was entitled under Rule 1238 to such allowance—the words “from some other cause” in that Rule being wide enough to cover the case.

Brockville and Ottawa R. W. Co. v. Canada Central R. W. Co., 7 P. R. 372, and *Morrison v. Taylor*, 9 P. R. 390, approved and followed.

The Court will not interfere with the discretion exercised by the Master in fixing the amount of the allowance.

Langton, Q.C., for the sheriff of Toronto.

W. R. Smyth, for the plaintiff.

D. Armour, for the defendants.

THOMPSON v. WILLIAMSON.

Security for costs—Action against justice of the peace—53 V. c. 23—Form of order—Time—Dismissal of action.

An order under 53 V. c. 23 for security for costs in an action against a justice of the peace should not limit a time within which security is to be given nor provide for dismissal of the action in default; the order should be simply “that the plaintiff do give security for the costs of the defendant to be incurred in the action.”

Walter Read, for the plaintiffs.

C. W. Kerr, for the defendant Williamson.

[BOYD, C., 19TH DECEMBER, 1894.]

CHAPMAN v. BUNBURY.

Vendor and purchaser—Possessory title—Evidence—Negating exceptions in statute—Abstract—Verification of title.

A different rule of practice exists in cases of vendor and purchaser from that which obtains in matters of litigation between adverse claimants, for, while in the latter purely affirmative evidence is all that is required, in the former a vendor may be required to furnish evidence to prove or disprove facts, which, if he were litigant, it would be the duty of his opponent to negative or establish. This applies to cases of possessory title, where the Courts will recognize peaceful and continuous possession for the statutory period as constituting a good title, while, before such title will be forced on an unwilling purchaser, it may be necessary for the vendor to furnish satisfactory evidence negating any of the exceptions contained in the statute. This, however, is not a matter to be put on the abstract, but rather on the verification of title before the Master.

Moss, Q.C., for the vendor.

Allan Cassels, for the purchaser.

[MEREDITH, C.J., 10TH DECEMBER, 1894.]

WHEELER v. BROOKE.

Mortgage—Right of mortgagor to assignment of first mortgage—Tacking.

Where the plaintiff, the mortgagor of certain lands, sold them for a sum in excess of the amount of his mortgage, the purchaser raising such excess by a mortgage to the defendant, the original mortgagee, the plaintiff was held entitled to an assignment of the mortgage made by him, on his paying the defendant merely the amount due thereon.

Brewster, for the plaintiff.

W. H. Blake, for the defendant.

[ROSE, J., 19TH SEPTEMBER, 1894.]

DINGMAN v. HARRIS.

Married woman—Separate estate—Joint contract.

A married woman having separate estate may enter into a contract along with co-contractors, and thereby charge such estate.

Rowan, for the plaintiff.

Kilmer, for the adult defendants.

W. Davidson, for the infant defendant.

IN CHAMBERS.

[MEREDITH, C.J., 23RD JANUARY, 1895.]

THOMPSON v. HOWSON.

Pleading—Notice of trial—Christmas vacation—Amendment—Leave—Time—Close of pleadings—Rules 392, 427, 484, 1331.

A party to an action has the right, notwithstanding the insertion in Rule 484, by Rule 1331, of the words "or of the Christmas vacation," to deliver a pleading during such vacation; and a notice of trial given therein is regular.

Where a pleading is amended under an order giving leave to amend, Rule 427 does not apply; and, under Rule 392, when the amendments allowed by the order have been made or the time thereby limited for making them has elapsed, the pleadings are in the same position as to their being closed as they were in when the order was made.

W. E. Middleton, for the plaintiff.

J. H. Moss, for the defendant.

[28TH JANUARY, 1895.]

ARNOLD v. TORONTO RAILWAY CO.

Trial—Stay of—Appeal from order directing new trial.

The Court may in a proper case stay the trial of an action pending an appeal from an order directing a new trial, but only under special circumstances.

It is not a ground for a stay that in the event of the appeal being successful the costs of the new trial will be thrown away, and that one party will be in danger of losing such costs, the other not being a person of means; and it is not desirable that the trial should be delayed to the possible prejudice of a party by the loss of testimony.

Watson, Q.C., for the plaintiff.

J. Bicknell, for the defendants.

In re PARKER, PARKER v. PARKER.

Security for costs—Executors and administrators—Money in Court—Motion for payment out.

An executrix stands in no different position as to the liability to give security for costs from a litigant suing in his own right.

And an executrix resident abroad, applying for payment out of Court of moneys to the credit of her testator, was ordered to give security for the costs of an alleged assignee of the fund, who opposed the application.

The rule as to security applies to a motion as well as to a petition.

H. F. Caston, for the executrix.

Masten, for the assignee.

WELSBACH INCANDESCENT GASLIGHT CO. v. ST. LEGER.

Security for costs—Foreign corporation—Assets in Ontario—Doing business in Ontario.

The plaintiffs, a foreign corporation, having acquired the patent right to manufacture and sell a certain incandescent light

in the Dominion of Canada, entered into an agreement with another company by which the latter were to act as the agents of the plaintiffs in Ontario and to manufacture and sell the lights at a fixed price, or lease them, and the plaintiffs were to receive the net profits, guaranteeing the other company against loss. The other company carried on the business and leased the lights in their own name. A large number of these lights were in existence in Ontario, under lease to different persons.

Held, that, as the lights could not be made available in execution without a taking of accounts between the two companies, they were not assets of the plaintiffs in Ontario sufficient to answer a motion for security for costs.

Nor could the plaintiffs be regarded as resident in Ontario by reason of their doing business through the medium of the other company.

R. McKay, for the plaintiffs.

C. W. Kerr, for the defendant St. Leger.

Hulme, for the defendant Christie.

John Clark, for the defendant Nelson.

[FERGUSON, J., 14TH JANUARY, 1895.]

HUNTER v. GRAND TRUNK R. W. CO.

Discovery—Production of documents—Railway casualty—Reports—Privilege.

Where reports by officers or servants of a railway company as to a casualty giving rise to an action are in good faith prepared for the purpose of being communicated to the company's solicitor with the object of obtaining his advice thereon, and enabling him to defend the action, they are to be regarded as privileged communications and exempt from production for inspection by the opposite party, even if they answer the purpose of giving information to other people as well.

W. R. Smyth, for the plaintiff.

D. Armour, for the defendants.

[18TH JANUARY, 1895.]

MERCHANTS BANK OF CANADA v. KETCHUM.

Examination—Special examiner's chambers—Discretion as to admission of persons.

A special examiner has a discretion to admit or exclude from his chambers persons who desire to be present upon an examination.

And where a defendant attended for examination as a judgment debtor, but refused to answer questions unless a former partner of his, who was present to instruct counsel for the judgment creditors, was excluded :—

Held, that the examiner rightly exercised his discretion in refusing to exclude; and the defendant was ordered to attend again at his own expense.

C. R. W. Biggar, Q.C., for the plaintiffs.

Waldron, for the defendant.

[19TH JANUARY, 1895.]

MACRAE v. NEWS PRINTING CO.

Jury notice—R. S. O. c. 44, s. 78 (2)—Filing—Time—Allowance.

Where a jury notice is served in due time, but by inadvertence filed too late to comply with R. S. O. c. 44, s. 78 (2), there is power to make an order allowing it to stand good; and such an order should be made if the case is one proper to be tried by a jury.

E. G. Rykert, for the plaintiffs.

G. A. M. Young, for the defendants.

MASTER'S OFFICE.

[THE LOCAL MASTER AT HAMILTON, 15TH JANUARY, 1895.]

GUEST v. HAHNAN.

Mechanics' liens—Public charitable building.

Application by a sub-contractor under the Act to simplify

the procedure for enforcing mechanics' liens, 53 V. c. 37, to determine whether the plaintiff was entitled to a lien.

Gauld, for the plaintiff.

Logie, for the defendant Hahnan.

Mackelcan, Q.C., for the defendants the city of Hamilton.

THE MASTER—The premises upon which the lien is claimed are composed of a building known as "The House of Refuge," and the lands used and enjoyed therewith: they are vested in the corporation of Hamilton, who erected the building "for public beneficial and charitable purposes." The said house and lands are therefore of such a character as not to be liable to sale in execution, and consequently no lien attaches. Application dismissed.

Vide cases and authorities cited under note (g) to s. 4, Holmsted's Mechanics' Lien Act, 1887; Am. & Eng. Encyc. of Law, vol. 15, p. 29; Harrison's Mun. Manual, last ed., p. 317. note (a).

MANITOBA.

In the Queen's Bench.

[FULL COURT, 15TH JANUARY, 1895.]

McMAIN v. OBEE.

Prohibition—County Court—Amount in dispute—Liquidation—Interest—County Courts Act, s. 330—Amendment to give jurisdiction—Discretion—Statute of Limitations.

Held, reversing the decision of TAYLOR, C.J., 14 Occ. N. 457, KILLAM, J., dissenting, that on the face of the proceedings, as shown by the particulars, the claim was within the jurisdiction of the Court, and the Judge had the power to allow the plaintiff to abandon the excess of two per cent. over the legal interest

from the maturity of the note, or to amend his particulars by reducing his claim for interest from eight per cent. to six per cent.

The amount claimed on the note as principal was only \$155. Under s.-s. (b) of s. 360 of the County Courts Act, R. S. M. c. 33, the balance payable, being manifestly liquidated, is only to be looked at, and it makes no difference whether the note was originally for \$255 or for \$500. The amount of interest claimed, \$178.80, admitting it to be unsettled, added to the liquidated claim, made an aggregate of \$833.80, which was within the jurisdiction of the County Court.

Per KILLAM, J.—The County Court Judge could not, by amendment, bring the action within the jurisdiction of the Court. The claim being upon its face one beyond the jurisdiction, the defendant was entitled, of right, to a prohibition.

Andrews, for the plaintiff.

Clark, for the defendant.

In re RURAL MUNICIPALITY OF MACDONALD.

Municipal corporations—Resolutions of council—Special meetings—Procedure at.

Summons by a resident ratepayer under s. 885 of the Municipal Act to quash certain resolutions passed by the council of the municipality, upon the ground that they were passed at a special meeting of the council, and the notice of the meeting given to the members of the council did not mention the matters dealt with by these resolutions as subjects or matters to be taken into consideration at the meeting.

The notice calling the meeting at which the resolutions moved against were passed did not contain any notice of the business intended to be transacted.

Held, affirming the decision of TAYLOR, C.J., 14 Occ. N. 459, that the resolutions moved against should be quashed and the summons made absolute with costs; DUBUC, J., dissenting.

Martin, for the municipality.

Patterson, for the applicant.

[KILLAM, J., 25TH JANUARY, 1895.]

BANQUE D'HOCHELAGA v. MERCHANTS' BANK.

Banks and banking—Bank Act—Security given under schedule C.—Subsequent security fraudulently given on same goods—Rights of claimants.

An action at law by one incorporated bank against another such bank and two individuals. The declaration contained two counts, one in trover for the conversion of 5,000 lbs. of bacon, and the other in detinue for a similar quantity of the same article. To the first count the defendants pleaded that they did not take the goods, and that the goods were theirs and not the plaintiffs', and to the second count they pleaded that they did not detain the goods, and that they were not the plaintiffs' goods. Both plaintiffs and defendants claimed the goods under instruments in the form in schedule C. to the Bank Act, 53 V. c. 31. These instruments were made by Walter Allen, carrying on business within the meaning of s. 74 of the Act.

On the 9th October, 1893, the defendants advanced to Allen \$2,500 upon the security of his promissory note and an instrument in the form mentioned, covering, among other goods, 3,500 lbs. of bacon; three further advances were made subsequently on the security of other goods.

When Allen arranged for these advances, he agreed with the local manager of the defendants to ticket the goods so as to identify them, and not to sell them. He set apart certain products of hogs as belonging to the defendants, and placed tickets over them to indicate it. Allen, however, kept selling these goods in the ordinary course of business, replenishing the piles from new goods purchased; when the manager or other officials visited the premises, Allen pointed out certain piles of goods, so marked, as the property of the defendants. It did not appear that, prior to 27th March, 1894, either the manager or his assistant knew of the sales and changes in the identity of the goods. The notes were renewed from time to time, and on 27th March, 1894, \$8,400 was owing to the defendants on these renewals. On that date it was arranged that the securities should be consolidated, and two new notes for \$4,200 each were given by Allen, with another instrument in the form in schedule C. to the Act, covering various products, among others, 40,000 lbs. of bacon. Allen then informed the manager that he had sold some portions of the goods hypothecated to the defendants,

and substituted other goods. The old notes and securities were marked as "paid," but retained by the defendants. Allen continued to sell the goods and place others on the piles appropriated to the defendants.

On 1st May, 1894, Allen gave security in the form in schedule C. to the plaintiffs to secure a then pre-existing debt owing by him to them. It covered, *inter alia*, 10,000 lbs. of dry salt bacon. Allen estimated that on 1st May he had on hand about 60,000 lbs. of dry salt bacon. No appropriation of any particular bacon as hypothecated to the plaintiffs was made until about 21st June, when their inspector went to Allen's premises and asked to see the goods. Allen put him off, arranging with him that he should return at a later hour. At that time there was not sufficient bacon on the premises to satisfy the securities of both banks, and Allen caused a quantity estimated at 10,000 lbs. to be taken from the pile appropriated to the defendants and placed separately, and marked with tickets to show that it belonged to the plaintiffs. The defendants' tickets were removed from the premises. Subsequently the plaintiffs' inspector and solicitor called, when the property was pointed out to them as the plaintiffs' security, and they departed satisfied with the arrangement. The next day the solicitor went to Allen's residence and obtained an order directing his, Allen's, son to take possession of the goods as agent for the plaintiffs, and hold them until payment of the debt to the plaintiffs. The instrument was delivered to the son, who refused to act upon it. Shortly afterwards Allen absconded, and the Merchants' Bank, through their co-defendants, took possession of the property under their securities. Allen stated that between 27th March and 21st June all of the goods hypothecated to the defendants had been sold and other bacon, etc., substituted therefor.

Held, that instruments in the form in the schedule to the Act do not depend for validity upon the statute, but would be apt to pass the legal property in the goods at common law. The instruments were expressed to be for consideration, and the word "assign," and the general tenour and object of the instruments, indicated sufficiently the intention to pass the property at once. As to the plaintiffs' security, there seemed to be nothing illegal in the transaction, and as between the parties it should have effect. But when it was given, the

property in question was not, nor was any property, sufficiently identified to pass by it. Yet when Allen set aside and appropriated the bacon to the plaintiffs, and their officers accepted the appropriation, at common law, as between Allen and the plaintiffs, the property passed to the plaintiffs. Upon the same principles, at the time of this appropriation, as between Allen and the defendants, the bacon was the property of the latter.

The plaintiffs' counsel contended that the transaction of 27th March cancelled the former securities, and that the new one then given could not be taken to have been as upon a contemporaneous advance.

Held, that the former securities could not be deemed so far cancelled as to prevent the defendants from relying upon them. The stamping of the word "paid" upon the notes and securities could not be taken as indicating that the old debts were discharged, or the property in the goods re-transferred; regard must be had in such cases to the practice of bankers. The transaction of 27th March could be considered merely a renewal of the old notes and not as re-transferring any title which the defendants had to the goods in Allen's possession. As between Allen and the defendants, he could not dispute the title of the latter to the goods which he substituted for those originally hypothecated: *Great Western R. W. Co. v. Hodgson*, 44 U. C. R. 187, and *Bank of Hamilton v. Noye Manufacturing Co.*, 9 O. R. 681. The claim of the defendants being the earlier, and Allen having no right to transfer away their property, their claim must prevail, unless in some way they were prevented from setting up their claim as against the later transferees. The defendants were entitled to the then existing goods as against Allen on 27th March. The new security then given should not be taken as substituted for the others so as to give the defendants title under that alone. The old securities did not require registration to preserve the defendants' title as against other transferees of Allen. The defendants gave no consent to and had no notice of his subsequent sales and substitutions, and were entitled to set up as against him and his transferees the same claim to the substituted as to the original goods, and therefore the title of the defendants must prevail against the plaintiffs' claim.

Howell, Q.C., and *Ashbaugh*, for the plaintiffs.

Phippen and *W. J. Tupper*, for the defendants.

ONTARIO.

Supreme Court of Judicature.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 28TH MARCH, 1895.]

In re ARMACOST v. SMITH.

Prohibition—Division Court—Increased jurisdiction—Ascertainment of amount.

Decision of STREET, J., 14 Occ. N. 514, affirmed on appeal.

Held, that the plaintiffs' claim, being for the recovery of a money demand, the amount of which did not exceed \$200 and was ascertained by the signature of the defendant, was within the jurisdiction of the Division Court; and the Judge having jurisdiction to try the case, the conclusion at which he arrived upon the evidence was not a matter for review upon a motion for prohibition.

Masten, for the plaintiffs.

Walter Read, for the defendant.

CHANCERY DIVISION.

[FERGUSON, J., 21ST OCTOBER, 1894.]

SCOTTISH AMERICAN INVESTMENT CO. v.
SEXTON.*Fixtures—Furnaces—Removal of—Rights of mortgagee.*

On an application to a company for a loan on seven dwelling houses, it was agreed that the houses were to be completed, including furnaces, before the money should be advanced. The houses were completed and the furnaces put in before the money was advanced, and a mortgage taken. After the mortgage was given, the mortgagor removed five of the furnaces and put them in other houses belonging to another person, and proposed to remove the other two.

Held, that, as between the mortgagor and the company, the furnaces were part of the freehold; that the company was the owner, and the wrongful taking by the mortgagor would not enable him to pass title even to an innocent purchaser for value; and injunctions were granted restraining the removal of the two not removed and ordering the delivery up of the five removed.

W. Cassels, Q.C., and Howell, for the plaintiffs.

Cook, for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 8TH SEPTEMBER, 1894.]

CROMBIE v. YOUNG.

Mortgage—Subsequent voluntary settlement by mortgagor—Validity of—Husband and wife.

The mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within 27 Eliz. c. 4, nor is the mortgage debt a debt within that statute, but only when it is shown that the mortgage security at the time of the loan was of less value than the amount thereof.

Where, therefore, shortly after the making of a mortgage, the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the mortgaged property at the time being greatly in excess of the amount of the loan, and deemed by all parties to be ample security, and no intention to defraud being shown, the settlement was upheld, though, from the stagnation of real estate when the mortgage matured, a sale of the property for the amount of the indebtedness thereon could not be effected.

Worrell, Q.C., for the plaintiff.

Moss, Q.C., and *John Douglas*, for the defendant.

IN CHAMBERS.

[MEREDITH, C.J., 28TH JANUARY, 1895.]

In re COLQUHOUN.

Devolution of Estates Act—Rights of children of deceased brother or sister.

The children of a deceased brother or sister are not entitled under s. 6 of the Devolution of Estates Act, R. S. O. c. 108, to participate in the distribution of the intestate's estate.

J. M. Clark, for the applicant.

A. J. Boyd, for the official guardian.

In the County Court of the County of York.

[McDOUGALL, Co.J., 14TH FEBRUARY, 1895]

In re CONFEDERATION LIFE ASSOCIATION AND CITY OF TORONTO.

Assessment and taxes—Life insurance company—Interest upon investments—Dominion Insurance Act, R. S. C. c. 124, s. 35—Amending Act, 57 & 58 V. c. 20, s. 12.

An appeal by the association from the decision of the Court of Revision for the city of Toronto confirming an assessment of the association for income.

A. J. Russell Snow, for the appellants.

H. L. Drayton, for the corporation of the city of Toronto.

McDOUGALL, Co.J.—This is an appeal from the assessment as income of the sum received by the Confederation Life Association from their investments; and incidentally it is sought to secure a reconsideration by me of my judgment pronounced in 1898, 29 C. L. J. 151, settling the basis upon which the assessment of the income of the company should be levied.

I have no reason to change the opinion I expressed in that judgment; and, as the propriety of the assessment made thereunder is now being considered by the Court of Appeal, until that Court determines the question adversely to the opinion I then expressed, I must adhere to it.

The only additional question that arises upon this appeal and which I feel bound to consider, is the fact of an amendment made in the Dominion Insurance Act in 1894. R. S. C. c. 124 is amended by 57 & 58 V. c. 20; by s. 12 of which amending Act, s.-a. 1 of s. 85 of the Insurance Act is repealed, and the following substituted :—

“ In computing or estimating the reserve necessary to be held in order to cover its liability to policy-holders in Canada, each company may employ any of the standard tables of mortality as used by it in the construction of its tables, [but there shall be set apart and credited to such reserve in each year out of the interest earned in the year, a sum equal to four and one-half per cent. per annum on the amount of the reserve as at the end of the preceding year, together with such further additions from premiums received during the year, if any, as shall be necessary to bring the reserve up to the standard provided by sub-section 10 of section 25 of this Act. Provided, that in no case shall a company be required to maintain a reserve in excess of that provided for by the said sub-section 10 of section 25 of this Act.”]

The words in brackets are in lieu of the following words, “ *and any rate of interest not exceeding four and one-half per cent. per annum.*”

It is contended that the words in the new section impose a liability upon the company different or more exacting than that imposed by the words in the original section. The language of

the former section directed the reserve to be computed according to standard tables of mortality, with four and one-half per cent. per annum added. The new section amplifies this language, but, in my opinion, says the same thing with this change, that in computing their reserve they shall add to it annually a sum equal to interest at the rate of four and one-half per cent. per annum upon such reserve, and if the aggregate result obtained should be, according to the mortality tables, insufficient, they must make up such deficiency by adding to it enough funds from premiums received during the year to bring the reserve up to the required amount. The object of this is to establish and maintain a fund or reserve sufficient in amount, according to the standard tables of mortality, to cover the liabilities to policy-holders in Canada for the year in respect of which the calculation is made.

The old section said that interest should be added at the rate of four and one-half per cent. The new section says that from the interest earned in the year, interest to the extent of four and one-half per cent. on the amount of the reserve shall be added.

I see no difference in the legal effect of the language used. The latter section is more explicit, and indicates how any shortage or deficiency is to be met, namely, from premiums received during the year, a point upon which the original section was silent.

I am referred to the case of *Peters v. City of St. John*, 21 S. C. R. 647, as being a decision that exempts from taxation the sums so alleged to be set apart by the amended Insurance Act. I do not read the case as so deciding. I think that that case can be looked upon as determining only that, in ascertaining what the net profits of a branch office are, where the Assessment Act in force in that province imposes a tax in respect of net profits derived from premiums, portions of such premiums applied in a particular way as required by the Insurance Act must be deducted from the gross receipts of premiums received by such branch office before the net profits of the branch office derived from such premiums can be determined.

It has been decided in *New York Life Ins. Co. v. Styles*, 14 App. Cas. 881, that, in reference to participating policy-holders who by virtue of their contracts are members of the company,

the profits arising from the operations of the Act, so far as they arise in respect of that class of policy-holders, are not income, and are not taxable as such. In other words, that where higher rates of premium have been charged to such policy-holders than are required to carry their policies, the excess of premium so charged is not income, and can be returned to such policy-holders without becoming liable to an income tax. It is not really a profit, but an over-charge, and is literally a rebate. In the same case it was held that all income derived from investments of all premiums or other money paid to them in the United Kingdom or invested in the United Kingdom or abroad, and as to the latter when such income is received in the United Kingdom, is taxable as income.

To put this expression into plain language, it is, in effect, that so much of the premiums as are actually retained by the company and invested by it for the purposes of the company become in effect the capital or principal fund of the company; and interest earned by such investment of such fund is income and is liable to an income tax.

If I was right in 1893 in holding that interest earned upon the investments of this company is income and is taxable as such in Ontario, I fail to see how the language of s. 12 of the Dominion statute of 1894 alters the liability of the company. It does not declare that such interest is not income. And if it did so, I very humbly submit the opinion that any such legislation would be *ultra vires* of the Dominion legislature. It does not declare that it shall not be taxable under enactments of the Provincial legislature. Such a provision would also be beyond the powers of the Dominion legislature to enact.

The Act declares simply that the reserve which the company must have in hand must be improved annually by four and one-half per cent. interest on the amount of such reserve; and that if the reserve itself is insufficient in amount, according to the standard mortality tables, when so improved, the deficiency must be made up from premiums received from policy holders in the current year.

The judgment I delivered in 1893 has been confirmed by the opinion of Mr. Justice Ferguson who holds that interest on investments is income: 24 O. R. 643. And I do not find in the amended Dominion statute any direction that the interest

actually earned by the investment of the actual funds which may make up the reserve is directed *eo nomine* to be added to the reserve. The direction to the company is that out of the interest earned by the company a sum equal to four and one-half per cent. on the amount of the reserve shall be added to the reserve.

In *Mersey Docks Board v. Lucas*, 8 App. Cas. 891, a statute directed that the moneys received by the board from dues and other sources of revenue should be applied in payment of expenses, interest upon debts, construction works, and management of the estate; and that the surplus should be applied to a sinking fund for the extinguishment of the principal of all the debts, and that after such extinguishment the rates should be reduced, and that, except as aforesaid, the moneys should be applied for any purpose whatsoever; and that nothing should affect their liability to parochial or other local rates. There it was held that this direction of the statute did not prevent such surplus from being liable for income taxes. Here is an express direction that the surplus should be applied in a certain way, and not otherwise.

But the Court held that these words were only directory and that there must be read into the statute that such surplus was only to be so applied after all charges imposed by law or the revenue had been first discharged.

In the case of life insurance companies, if the sum earned for interest, after making all proper deductions—and one of such proper deductions would be taxes paid in respect of income—is not sufficient, the deficiency is directed to be made up from premiums received in the year. The very fact that a possible deficiency is provided for in this manner indicates to my mind that the legislature anticipated that the interest earned by the company might possibly not amount to a sum equal to four and one-half per cent. on the proper reserve, or that such interest fund might be depleted from other proper causes; and to meet any such contingency provision is made to supply the loss from another source of revenue.

I think the language of Mr. Justice Ferguson is still applicable notwithstanding the amendment to the Insurance Act in 1894. He says, “I do not see that the interest arising upon

the investments of the reserve fund is appropriated by law to the purposes of the necessary increase of the fund ;" and again, " I do not say, nor does it anywhere appear before me, that by law the interest arising upon the investment of it, must be appropriated to the purpose of its increase ;" and again, " They are not obliged by law, when they receive interest arising upon investments of the fund, or parts of it, to apply such interest directly to the increase of the fund, however proper and commendable it would be to do so."

I am of the opinion, therefore, that this appeal should be dismissed and the assessment confirmed. As to the proper figures to be inserted upon the roll, I will accept a statement from Mr. Macdonald, the actuary, as to the income of the company under the different heads as set out in my judgment in this matter, and reduce or increase the actual assessment made in the present year to the amount indicated in any such statement.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 4TH FEBRUARY, 1895.]

GILLIES v. COMMERCIAL BANK OF MANITOBA.

Specific performance—Agreement to pay creditors not parties to the deed—Bank Act—Question of validity of securities—Relief against trustee.

Appeal from decision of KILLAM, J., 14 Occ. N. 379, dismissed with costs.

BROWN v. WATSON.

Husband and wife—Alleged fraudulent conveyance—Mistake—Correcting same.

Appeal from decision of DUBUC, J., 14 Occ. N. 353, dismissed with costs.

McEWAN v. HENDERSON:

Pleading—Demurrer to pleas—Action on covenant in assignment of mortgage.

Appeal from decision of KILLAM, J., 14 Occ. N. 517, dismissed with costs.

[16TH FEBRUARY, 1895.]

FULLERTON v. BRYDGES.

Deed—Bill to reform—Conveyance subject to mortgage—Obligation to indemnify against mortgage—Estoppel, operation of recital as.

Appeal from decision of TAYLOR, C.J., 14 Occ. N. 412, dismissed with costs.

MAXWELL v. CLARK.

Prohibition—County Court—Want of jurisdiction—Insufficient proof—Writ of prohibition, how directed—County Court Judge.

Application by defendant to review a decision of DUBUC, J., refusing a writ of prohibition to prohibit a County Court from proceeding further in an action against the applicant.

The action was upon a promissory note made by the defendant, dated and payable at Winnipeg, but sworn to have been made within the judicial division of Killarney.

The action was commenced in the County Court of Killarney by special writ of summons on 29th January, 1894. The writ of summons was served on the defendant in the province of Ontario on the 8th February, 1894. On 14th February the defendant entered a dispute note, setting up only the defence of payment. On the 8th May the suit came up for trial before Mr. Prudhomme, a Judge of County Courts for a portion of the Eastern Judicial District, though not for the portion including the judicial division of Killarney, but who was then presiding at a sitting of the Court at the request of the Judge of the Court.

At the opening of the case counsel for the defendant objected to the jurisdiction, on the ground that the cause of action did not arise within the judicial division, and the defendant did not reside therein. After some evidence had been taken, counsel for the defendant asked to have the dispute note amended to set

up the alleged want of jurisdiction, which was refused. The Judge entered a verdict for the plaintiffs.

The rule for prohibition called upon Mr. Prudhomme, Judge of the County Court of Killarney, as well as the plaintiffs, to show cause why a writ of prohibition should not issue, directed to the said Mr. Prudhomme, Judge of that Court; and before the full Court objection was taken that the rule should have called on the regular Judge of the Court for the time being to show cause, and that a prohibition should be directed only to him.

Held, that the Judge to be called upon to show cause and to whom the writ, if issued, should be directed, whether by his name or by designation of his office, was the duly appointed Judge of the Court for the time being. After disposing of the business which he was requested to transact for the Judge of the Court, Mr. Prudhomme became *functus officio*, and a writ directed to him could not affect the Court, except by indicating the opinion of this Court. Under the circumstances of this case, the defendant, having in no way accounted for his failure to raise the objection to the jurisdiction by his dispute note, or to come before judgment for prohibition, should be required to make a strong case to warrant a grant of the writ now. In strictness the defendant did not show by his original affidavit that he did not reside in the judicial division of Killarney when the action was commenced. He showed only that he did not so reside when he made his affidavit, and that he had resided in Ontario continuously before and since the commencement of the action. The subsequent affidavit in reply should not be used to support the original case.

Rule dismissing the application for prohibition affirmed, and the present application dismissed with costs.

H. E. Crawford, Q.C., for the plaintiffs.

O. H. Clark, for the defendant.

[DUBUC, J., 25TH FEBRUARY, 1895.]

CREDIT FONCIER FRANCO-CANADIEN v. SCHULTZ.

*Equity pleading—Bill by judgment creditor to set aside fraudulent conveyance
—Demurrer—Allegations as to judgment and registration of certificate.*

Demurrer to plaintiffs' bill, which alleged that J. C. Schultz,

the husband of the defendant Agnes Schultz, mortgaged certain properties to the plaintiffs; that default having been made in payment, proceedings were taken against him, and a decree made for payment of the amount due, in pursuance of which an execution was placed in the sheriff's hands and returned *nulla bona*; a certificate of the decree was also issued and registered, but, immediately after the making of the mortgage to the plaintiffs, J. C. Schultz conveyed to and vested in his wife, the defendant, all his real and personal property, so that any judgment the plaintiffs might recover against him would be null and void; that the defendant knew of the said fraudulent design, and that the transfers and conveyances to her were wholly voluntary. The plaintiffs asked for a declaration that they had a lien on the lands in the district where their certificate of judgment was registered, and that the conveyance to the defendant might be declared fraudulent and void as against the plaintiffs.

The principal points raised by the demurrer were that the bill did not allege that the plaintiffs had such a decree as is mentioned in s. 6 of the Judgments Act, R. S. M. c. 80, and that it did not allege that the plaintiffs had such a certificate issued and registered as is required by the latter part of the same section. The allegations supposed to be deficient were contained in paragraph 6 of the bill, which alleged that under proceedings taken under and by virtue of the mortgage a decree was made, and in pursuance of such decree the Master made a report, and the plaintiffs recovered judgment against J. C. Schultz, and he was ordered to pay the amount due for principal and interest.

Held, that the objection raised by the demurrer on this point should not be sustained; there was no such vagueness or uncertainty in the statement as could in any way mislead or embarrass the defendant, and there could be no misconception in the true meaning of that part of the allegation where it was stated that J. C. Schultz was ordered to pay.

As to the certificate, s. 6 of the statute states that the decree may be registered "on the certificate of the registrar, signed by him, under the seal of the Court, stating the title of the cause or matter in which the decree or order has been made," etc. The allegation in paragraph 6 of the bill was as follows:—"And in pursuance of the said decree and report and proceedings thereunder, your complainant caused a certificate of the said decree to be issued out of this Honourable Court and caused the same to

- be registered," etc. It was contended that the omission to state that the certificate was the certificate "of the registrar, signed by him, under the seal of the Court" made the allegation insufficient.

Held, that the allegation was sufficient. The maxim *omnia præsumentur rite esse acta* was fully applicable here.

The demurrer should be overruled, but, as the allegation as to the decree and order to pay was not as particular and as complete as it might be, it should be overruled without costs.

Howell, Q.C., and *Huggard*, for the plaintiffs.

Tupper, Q.C., and *Phippen*, for the defendants,

IN CHAMBERS.

[KILLAM, J., 28TH JANUARY, 1895.]

SHIELDS v. McLAREN.

Master's report—Leave to appeal from, after time expired—Appellant insolvent—Terms on which leave granted.

The defendant John Shields appealed to a Judge in Chambers from a report of the Master.

An objection was taken that the report had not been filed, and the appeal was struck out.

The defendant then applied for leave to appeal, notwithstanding that the time allowed for appealing had expired. An affidavit was filed showing that the appellant was insolvent.

Held, that there were some substantial objections to the report which the proposed appellant should not be precluded from raising.

He had evidently prosecuted his appeal in good faith, and there was nothing to suggest that any person had been led to change his position by the delay.

The applicant might still appeal from the Master's report on payment of the costs of the former appeal struck out and of this application within ten days after taxation thereof, and upon the applicant giving, within the same period, security to the satisfaction of the Master in Equity for costs of the proposed appeal, including those of any re-hearing, if such should be had.

Mulock, Q.C., for the appellant.

Kennedy, Q.C., and *Hough*, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.]

[5TH MARCH, 1895.

FOWELL v. CHOWN.

Patent of invention—Combination—Novelty.

An appeal by the plaintiff from the judgment of the Queen's Bench Division, 25 O. R. 71, was dismissed with costs, the Court holding that the article in question was a mere combination of old elements. No opinion was expressed as to the other points dealt with in the judgment below.

Moss, Q.C., *W. Cassels*, Q.C., and *E. G. Porter*, for the appellant.

Osler, Q.C., and *Clute*, Q.C., for the respondent.

CH. D.]

HOOFSTETTER v. ROOKER.

Mortgage—Charge—Executory agreement—Registry Act—Witness—R. S. O. c. 114, ss. 44, 45.

A letter in the following form, "I agree to charge the east half of lot number nineteen . . . with the payment of the two mortgages . . . amounting to \$750, . . . and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said mortgages," operates as a present charge upon the lands described, and may

be registered against them. It is not a mere executory agreement.

An affidavit of execution for the purpose of registration may be made by a person who writes his name, not as witness, but as the person to whom such a letter is addressed, and in fact witnesses the signature.

Judgment of the Chancery Division reversed.

Langton, Q.C., for the appellant.

W. Cassels, Q.C., for the respondent.

Boyd, C.]

MOORHOUSE v. HEWISH.

Sale of land—Description—"More or less"—Specific performances.

Where a city building lot was described in an agreement for sale as having a depth of "180 feet more or less," and had in fact a depth of 117 feet with a lane in rear 12 feet wide, specific performance at the suit of the vendor was refused.

Judgment of Boyd, C., affirmed.

A. Cassels, for the appellant.

J. Douglas, for the respondent.

Ferguson, J.]

CONFEDERATION LIFE ASSOCIATION v. CITY OF TORONTO.

Assessment and taxes—Insurance company—Reserve fund—Interest—Income.

Interest earned on the statutory reserve fund of a life insurance company is part of its assessable income.

The decision of the Judge of a County Court on a question of assessment is final, when he is dealing with property that is assessable at all.

Judgment of FERGUSON, J., 24 O. R. 643, affirmed.

S. H. Blake, Q.C., and A. J. Russell Snow, for the appellants.

Fullerton, Q.C., and Caswell, for the respondents.

ROSE, J.]

MERRITT v. CITY OF TORONTO.

Municipal corporations—Auctioneer—License.

Before the Amending Act of 1894, 57 V. c. 50, s. 8, a municipal corporation could not, on the ground of the applicant's bad character, refuse to issue an auctioneer's license.

Judgment of ROSE, J., 25 O. R. 257, affirmed.

Fullerton, Q.C., for the appellants.

DuVernet and J. E. Jones, for the respondent.

C. C. YORK.]

DUTHIE v. ESSERY.

Bills of exchange and promissory notes—Indorsement by stranger—53 V. c. 33, ss. 56, 88 (D.)

Where promissory notes payable to named payees were indorsed by the defendant before delivery to them, he was held liable to them in an action on the notes.

Judgment of the County Court of York reversed.

Shilton, for the appellant.

Keith, for the respondent.

C. C. LEEDS AND GRENVILLE.]

HUNT *qui tam* v. SHAVER.

Police magistrate—Justice of the peace—Return of convictions—Penalty—R. S. O. c. 76, ss. 1, 3—R. S. O. c. 77, s. 6.

A police magistrate, acting *ex officio* as justice of the peace, is not subject to the provisions of s. 1 of R. S. O. c. 76, and need not make a return as therein required to the clerk of the peace.

Section 6 of R. S. O. c. 77 exempts him from this duty whether he is acting as police magistrate or *ex officio* as justice of the peace.

Judgment of the County Court of Leeds and Grenville affirmed.

Moss, Q.C., for the appellant.

Delamere, Q.C., for the respondent.

SURR. C. GREY.]

[OSLER, J.A., 11TH MARCH, 1895.]

In re WILLIAMS.

Executors and administrators—Trusts and trustees—Just allowances—Costs of unsuccessful litigation—Advice of Court.

Where the administrators of the estate of a deceased assignee for creditors defended in good faith an action brought by his successor in the trust to recover damages for breach of trust committed by the intestate, and being unsuccessful were obliged to pay the plaintiff's costs and those of their own solicitors, they were held entitled to credit for these payments in passing their accounts.

Where it is plain that a dispute can be settled only by litigation, it is not necessary for a trustee to ask the advice of the Court before defending.

Judgment of the Surrogate Court of Grey reversed.

E. D. Armour, Q.C., and *E. T. Malone*, for the appellants.

W. H. Wright and *N. W. Rowell*, for the respondents.

IN CHAMBERS.

[OSLER, J.A., 6TH FEBRUARY, 1895.]

AGRICULTURAL INSURANCE CO. v. SARGENT.

Appeal—Supreme Court of Canada—Security—Execution, stay of—Money in Court—Payment out—R. S. C. c. 135, ss. 46, 47 (e), 48.

The plaintiffs appealed to the Court of Appeal from a judgment of the High Court dismissing their action with costs, and

gave the security required by s. 71 of the Judicature Act, by paying \$400 into Court; they also gave the security required by Rule 804 (4) in order to stay the execution of the judgment below for costs, by paying \$322.14 into Court. Their appeal was dismissed with costs. Desiring to appeal to the Supreme Court of Canada, they paid \$500 more into Court, and this was allowed by a Judge of the Court of Appeal as security for the costs of the further appeal.

Held, that execution was stayed upon the judgments of the High Court and Court of Appeal until the decision of the Supreme Court.

Construction of ss. 46, 47 (e), and 48 of the Supreme and Exchequer Courts Act, R. S. C. c. 135.

Semble, that payment out of the moneys in Court to the defendant of his costs of the High Court and Court of Appeal, upon the undertaking of his solicitors to repay in the event of the further appeal succeeding, could not properly be ordered.

Kelly v. Imperial Loan Co., 10 P. R. 499, commented on.

Pattullo, for the plaintiffs.

Masten, for the defendant.

[18TH FEBRUARY, 1895.]

In re BURNHAM.

Costs—Scale of—Court of Appeal—Water privilege—Appeal from order of County Court Judge—R. S. O. c. 119, s. 18.

The disposition of the costs of an appeal is not a part of the practice and proceedings upon the appeal.

Upon an appeal from an order of a County Court Judge, under R. S. O. c. 119, with respect to a water privilege, the Court of Appeal has power under s. 18 to direct that the costs shall be taxed on the scale applicable to High Court, County Court, or Division Court appeals; and the Judge to whom application for leave to appeal is made under s. 16 has no power to control the discretion of the Court in this respect.

W. H. Blake, for the appellant.

W. E. Middleton, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE JUSTICES IN BANC, 4TH MARCH, 1895.]

In re SOLICITOR.

Costs—Taxation—Solicitor and client—Counsel fee at trial—Advising on evidence—Reference—Unnecessary length—Allowance to solicitor—Brief—Copies of depositions—Counsel fees on Court motions.

Upon appeal from the taxation between solicitor and client of a bill of costs for the defence of an action of redemption in which, before the beginning of the sittings at which the action was entered for trial, an arrangement had been made between the parties that all the matters in question should be referred to a Master, and accordingly no witnesses were subpoenaed, and a reference was directed at the sittings :—

Held, that the taxing officer had no discretion to allow an increased counsel fee with brief at the trial, as the action could not be said to be of a special and important character ; nor to allow a fee for advising on evidence.

The reference lasted for 137 hours, 18 of which were occupied in argument. Nearly the whole of the time was devoted to the main matter in contest, viz., whether the defendants should be charged with an occupation rent, and if so at what amount. The Master found that they were chargeable with a rent of \$812.50. The taxing officer allowed the solicitor \$802 for the time occupied in taking the evidence and \$47 for the argument.

Held, that the allowance of counsel fees upon a reference, under clause 107 of the tariff, should be exceptional and made only when matters of special importance or difficulty are involved at some particular sitting ; and also that the taxing officer should have taken into consideration the unreasonable time occupied over so small a matter, and have exercised his discretion by confining the solicitor to the minimum allowance of \$1 an hour, under clause 104 of the tariff, for the argument as well as for the taking of the evidence.

The taxing officer allowed the solicitor \$77.50 for brief upon appeal from the Master's report; this amount included \$67.80 paid to the Master for copies of the depositions.

Held, that the solicitor had no *prima facie* right to order and charge for these copies, and, in the absence of any authority from his clients, should not be allowed for them upon taxation.

The taxing officer allowed the solicitor \$85 counsel fee upon the appeal, \$12 for travelling expenses, and \$10 counsel fee upon the plaintiff's motion for judgment, which came before the Court with the appeal.

Held, that these allowances, though liberal, were not so clearly wrong as to justify the Court in interfering.

W. E. Middleton, for the clients.

Tremear, for the solicitor.

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[THE DIVISIONAL COURT, 23RD FEBRUARY, 1895.]

ARGLES v. McMATH.

Landlord and tenant—Fixtures—Short Forms Act, R. S. O. c. 106—Forfeiture—Assignment for benefit of creditors—R. S. O. c. 143, s. 11—Notice—Re-entry—Election—Removal of fixtures—Time—Interference—Remedy.

The term "fixtures," as used in the extended form of the covenants to repair and to leave the premises in good repair in a lease made pursuant to the Short Forms Act, R. S. O. c. 106, includes only irremovable fixtures, which are such things as may be affixed to (*e.g.* doors and windows) or placed on (*e.g.* rail fences) the freehold, by the tenant, the property in which passes to the landlord immediately upon their being so affixed or placed, and in which the tenant at the same time ceases to have any property; and does not include removable fixtures, which are such things as may be affixed to the freehold for the purposes of trade or of domestic convenience or ornament, a qualified property in which remains in the tenant, or such things as may be affixed to the freehold for merely a temporary purpose, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains in the tenant.

The provisions of s. 11 of R. S. O. c. 148 do not extend to a forfeiture of the term under a stipulation in the lease that if the lessees should make any assignment for the benefit of creditors the term should immediately become forfeited, and such forfeiture is therefore enforceable without notice served upon the lessees.

Where the lessor has elected to re-enter for a forfeiture, the lessee has the right, while he remains in possession, to remove fixtures put up by him for the purposes of his trade, and has a reasonable time after such election within which to do so.

And where he attempts to do so within a reasonable time, and is prevented by the lessor, the latter is liable to an action for the value.

Judgment of BORD, C., 14 Occ. N. 468, reversed.

Shepley, Q.C., for the plaintiff.

William Macdonald, for the defendant.

[9TH MARCH, 1895.]

WYTHE v. MANUFACTURERS' ACCIDENT INSURANCE CO.

Contract—Employer's liability policy—Condition—Construction—Defence of actions brought by employees.

In an action upon an employer's liability policy, whereby the defendants agreed to pay the plaintiff all sums up to a certain limit and full costs of suit, if any, in respect of which the plaintiff should become liable to his employees for injuries received whilst in his service, subject to the condition, amongst others, that "if any proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefor":—

Held, that the plaintiff was not entitled, in the face of such a stipulation, to claim from the defendants the amount of a judgment obtained against him by an employee in an action defended by the plaintiff through his own solicitor and counsel,

leaving the defendants to show as a defence or by way of counter-claim that they could have done better by defending it themselves; nor was an offer by the plaintiff, at a time when the action was at issue and on the peremptory list for trial the following day, to hand over the defence to the defendants' solicitors, a sufficient compliance with the condition.

W. Cassels, Q.C., for the plaintiff.

W. Nesbitt and J. H. Denton, for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 21ST FEBRUARY, 1895.]

FARQUHAR v. CITY OF TORONTO.

*Chose in action—Assignment—Rights of assignor under original contract—
R. S. O. c. 122, ss. 6-13.*

A contract between the defendants and the plaintiff's assignor for the paving of a certain street provided that the defendants might, on the recommendation of the city engineer, settle and pay the price of any materials for which payments were in arrear, and deduct the amount thereof from any money falling due to the contractor under the contract. The contractor assigned to the plaintiff all such moneys so to become due to him, and the defendants were duly notified. After this the engineer certified that a certain sum was due to the contractor. The defendants, however, deducted from such sum the amount of a certain claim for materials furnished to the contractor.

Held, that they had the right to do so, notwithstanding the assignment to the plaintiff, which was subject to such conditions and restrictions with respect to the right of transfer as were contained in the original contract.

W. R. Riddell and W. R. Smyth, for the plaintiff.

Delamere, Q.C., for the defendants.

BRIDGEWATER CHEESE FACTORY CO. v. MURPHY.

Banks and banking—Promissory note—Improper signature by president for company—Discount—Repayment.

Decision of STREET, J., 14 Occ. N. 508, reversed.

Per MEREDITH, J.—The plaintiffs were placed in a position where they must affirm or disaffirm the transaction; if they affirmed, they were right in charging the defendants as they did, but were bound to credit them with the note when it eventually came home to them; if they disaffirmed the transaction, then they proved that they were not and never were entitled to the sum in question; and so in either case the action failed and should be dismissed.

Moss, Q.C., S. Masson, and D. E. K. Stewart, for the plaintiffs.

Osler, Q.C., and E. G. Porter, for the defendants.

GEMMILL v. NELLIGAN.

Husband and wife—Mortgage—Bar of dower—Right to dower in surplus.

Held, that where mortgaged lands have been sold by the mortgagee under the mortgage, the wife of the mortgagor, who has joined in the mortgage to bar her dower, is entitled to dower out of the surplus remaining after payment of the mortgage debt and costs, to the full extent of what would have been the value of her dower in the whole of the land, if the same had not been mortgaged or sold; and sufficient of such surplus must be paid into Court, there to remain to insure her dower in case she should become entitled thereto.

Pratt v. Bunnell, 21 O. R. 1, not followed so far as the reasoning and dicta thereto are opposed to the above decision.

W. H. Blake, for the defendant wife of the mortgagor.

L. G. McCarthy, for the defendant the mortgagor.

WEBB v. BARTON & STONEY CREEK CONSOLIDATED ROAD CO.

Road companies—Accident—"Done in pursuance of this Act"—Time limit—"Within six months next after the fact committed"—R. S. O. c. 159. s. 145.

Action for damages caused to the plaintiff by his carriage

striking a post of a railing placed by the defendants as a guard against the open drain at the mouth of a culvert on the defendants' road.

The defendants were a road company, incorporated under the General Road Companies Act, R. S. O. c. 159, and by s. 99 thereof were required to keep their road in repair.

Section 145 enacts that no action shall be brought for any matter or thing done in pursuance of this Act, unless such action be brought within six months next after the fact committed.

Held, that the construction of the culvert and the erection of the posts were matters "done in pursuance of this Act," although improperly done, so that there was not sufficient protection afforded thereby to guard the travelling public from falling into the ditch; and that under s. 145 the time for bringing the action was limited to six months from the date of the accident, and that period having elapsed, the plaintiff's action failed.

McCarthy, Q.C., for the defendants.

Aylesworth, Q.C., and *S. D. Biggar*, for the plaintiff.

KEATING v. GRAHAM.

Sale of goods—Mistake of vendor as to identity of vendee—Fraud—Vacating judgment against supposed vendee—Commencing action against true vendee.

Action for price of goods sold to the defendants, known as "The Polson Lenders."

On 23rd June, 1892, the Polson Iron Works Company wrote to order the goods in question from the plaintiff, and after some correspondence, F. B. Polson, as managing director of the company, wrote on 14th July, 1892, giving the final order, and on the following day the plaintiff replied undertaking to fulfil it. Meanwhile, on 8th July, 1892, the company had given up possession of their works to the Polson Lenders, and of all their plant and material, under an agreement whereby they were not to be liable for the debts of the business, nor to have thereafter substantially any benefit from them, F. R. Polson remaining as

their manager. The plaintiff, knowing nothing of this, on 5th August, 1892, shipped the goods to Toronto, and the Polson Lenders used them in their business. On 1st September, 1892, the plaintiff, still being ignorant of what had taken place, took a promissory note from the Polson Iron Works Company for the price of the goods, payable in four months, and, it being dishonoured at maturity, brought an action against the company, and in default of defence on 13th February, 1893, signed judgment against them.

Meanwhile, on 8th February, 1893, a winding-up order had been made against the company under the Dominion Winding-up Act. As soon as the plaintiff heard of this, he applied for and obtained an order dated 5th June, 1893, vacating his judgment. Moreover, having discovered the facts of the case, he commenced this action for the price of the goods.

Held, that the plaintiff was entitled to judgment.

Per ROBERTSON, J.—The plaintiff was entitled to say, "I thought I was dealing with the Polson Iron Works Company. My information was by written correspondence. I supposed I was selling to that company, and that the name of that company was used by one who had the authority of these defendants to order and buy goods from him. That was really a fraud on me. The goods were used by the defendants. I therefore repudiate the promissory note transaction and fall back on the undisclosed principals, who received goods from me and got the benefit of them."

Per MEREDITH, J.—This is not the case of a purchase by an agent in his own name for an undisclosed principal. The purchase was made by the defendant Polson in reality for himself and his co-defendants. They received and used the goods for their own benefit. And even if it cannot be said that the defendant Polson lawfully might and did buy the goods for the defendants, it is clear that they cannot repudiate his unauthorized act and yet retain the benefit of it. They would be bound to reject or return the goods if they wished to escape payment. There is no pretence that they bought them from the company. And though the plaintiff sued the company and proved his claim against them in the winding-up proceedings, he did so without knowledge of the facts, and in the reasonable belief that the company were really purchasers in the ordinary way of business;

and it would be a good replication to a plea of judgment recovered, that the judgment in question had been reversed or set aside.

Moss, Q.C., for the defendants.

Walter Read, for the plaintiff.

GREEN v. TORONTO RAILWAY CO.

Negligence — Street railway company — Right of way — Duty to sound the gong.

A car of the defendants' railway was coming along the down grade in the Queen Street subway. The plaintiff was engaged as a servant of the city of Toronto in sweeping the road bed. The motor man did not sound the gong, and ran into the plaintiff.

Held, that the judgment in favour of the plaintiff at the trial should be affirmed.

Although the defendant company had the right of way, that did not extend to the right of running along the streets of a city at such a rate that the motor man had not full control of the car or so as to endanger human life or property. The jury might rightly find that the not sounding of the gong or giving any warning to the plaintiff, who was in a place of danger, of the approach of the car, was actionable negligence on the part of the defendants.

J. Bicknell, for the defendants.

W. R. Smyth, for the plaintiff.

GORDON v. ARMSTRONG.

Security for costs—Nominal plaintiff—Action to establish right of way—Mortgagor and mortgagee—Parties.

Where an action is brought to establish a right of way over lands adjoining those of which the plaintiff is the owner subject

to a mortgage, and, having regard to the value of the property, the amount of the mortgage, and other circumstances, the lands may be said to be really the mortgagee's, and the action substantially his, the defendant is entitled to security for costs if the plaintiff be without substance.

Held, per MacMAHON, J., in Chambers, that the mortgagee was not a necessary party to the action.

But semble, per MEREDITH, J., in the Divisional Court, that he was a proper party and should have been added.

F. J. Travers, for the plaintiff.

Ritchie, Q.C., for the defendant.

F. E. Hodgins, for the mortgagee.

[2ND MARCH, 1895.]

CAMPBELL v. ELGIE.

Stay of proceedings—Costs of former action unpaid—Security for costs—Rules 3, 1243.

The practice by which, when the defendant's costs of a former action for the same or substantially the same cause were unpaid, the defendant was entitled to have the later action stayed until they should be paid, is now superseded by the effect of Rule 3, the defendant's only remedy being to apply under Rule 1243 for security for costs in the second action.

W. E. Middleton, for the plaintiff.

Kilmer, for the defendant Elgie.

COOK v. TATE.

Line fences—Proper mode of construction—Trespass—Fence-viewers—R. S. O. c. 219, s. 3.

Action for trespass.

The Line Fence Act, R. S. O. c. 219, s. 3, provides that "owners of occupied adjoining land shall make, keep up, and repair a just proportion of the fence which marks the boundary between them."

Held, per FERGUSON, J., affirming the decision of ARMOUR, C.J., the Judge at the trial, that such fence should be so placed that when completed the vertical centre of the boards should coincide with the line or limit between the lands of the parties, the board wall being the fence which really separates the land of one party from the land of the other; and, in the absence of any agreement or of any statute or by-law governing the case, each owner is bound to build the board wall and maintain it as best he may or can, by appliances placed in or upon his own land, 'if appliances are necessary; and he is not at liberty to place his posts or other appliances on the land of the adjoining owner without leave or license so to do.

Held, per BOYD, C., contra, that the fence may be placed partly on the land of each owner, and it should be, consistent with local usage and custom and fitness of situation, placed as far as possible equally on the lands of each, and if the line making the boundary line be between the posts on one side of the fence, and the scantling and boards on the other, so that there is practical equality in the amount of space on the one hand occupied by the post and on the other by the continuous boards, and if that method is sanctioned by local usage, neither owner has legal ground for complaint.

Semble, per BOYD, C., FERGUSON, J., dissenting, that such a controversy as this, involving merely "a matter of proportion," is under the above statute for the fence-viewers to determine.

J. H. Denton, for the plaintiff.

B. N. Davis, for the defendant.

BELL v. VILLENEUVE.

Writ of summons—Service out of jurisdiction—Rule 271 (s)—Breach of contract within jurisdiction—Letter—Evidence—Undertaking.

Where a contract of hiring is made within the province of Ontario and the work thereunder is to be done there, the commission therefor will also be payable there.

Hoerler v. Hanover, etc., Works, 10 Times L. R. 22, and *Robey v. Snaefell Mining Co.*, 20 Q. B. D. 152, referred to.

If the contract is ended by letter sent from another province, *quære* whether this indicates that the breach complained of was out of the province.

And where, upon a motion to set aside service of a writ of summons on defendants resident out of the jurisdiction in an action for breach of contract of hiring, there was conflicting evidence as to whether the discharge of the plaintiff from the defendants' service was by letter or by the act of an agent of the defendants within the province, the plaintiff was allowed to proceed to trial upon his undertaking to prove at the trial a cause of action within Rule 271 (e).

T. E. Williams, for the plaintiff.

Dewart, for the defendants.

MERIDEN BRITANNIA CO. v. BRADEN.

Costs—Separate defences—Indemnity against costs—Taxation against opposite party.

Costs are not to be needlessly incurred; only such as are reasonably incurred with regard to the necessities of the case should be allowed.

Where there is no liability on the part of a party for costs, none can be allowed him from his opponent.

And where one defendant agreed to save another harmless from the costs of an action; in the written retainer of the latter to his solicitors it was provided that the costs should be charged to the former; and no reason for defending by separate solicitors appeared, unless it was the hope of getting two sets of costs from the plaintiffs:—

Held, that the indemnified defendant was not entitled to costs against the plaintiffs.

Jarvis v. Great Western R. W. Co., 8 C. P. 280; and *Stevenson v. City of Kingston*, 81 C. P. 333, followed.

Decision of *Boyd, C.*, 16 P. R. 346, reversed.

J. W. Nesbitt, Q.C., for the plaintiffs.

C. D. Scott, for the defendant *Scott*.

FLICK v. BRISBIN.

Constitutional law—Criminal Code, 1892, ss. 865, 866—Intra vires—Assault—Bar of civil remedy.

Sections 865 and 866 of the Criminal Code, 1892, are *intra vires* of the Dominion Parliament.

Per BOYD, C.—The Code gives one who is assaulted the option to proceed by complaint in a summary way before a magistrate, and if he elects to take his remedy by this method of private prosecution he foregoes his right of action in respect of the same assault in order to recover damages as a civil wrong.

W. R. Smyth, for the plaintiff.

Fullerton, Q.C., for the defendant.

In re TORONTO BELT LINE R. W. CO. AND WESTERN CANADA L. & S. CO.

Railways—Compensation for land taken—"Owner"—Mortgagee—Injuri-ously affected—R. S. O. c. 170, s. 13.

Appeal from order of STREET, J., directing *mandamus* to the above railway company to arbitrate as to the compensation payable to the Western Canada L. & S. Co., as mortgagees, for injuries sustained by them through the taking by the railway company of a portion of certain lands mortgaged to them.

The railway company had fixed and settled the amount of compensation to be paid to the mortgagor, and set this up in answer to the motion.

Held, affirming the decision of STREET, J., that the mortgagor does not represent his mortgagee, and is not included in enumeration of the corporations or persons who, under s. 13 of R. S. O. c. 170, are enabled to sell or convey lands to the company; he can only deal with his own equity of redemption; and therefore the mortgagees were entitled to the *mandamus* as asked for.

L. G. McCarthy, for the railway company.

Goodwin Gibson, for the loan company.

[MACMAHON, J., 9TH MARCH, 1895.]

In re MIMICO SEWER PIPE AND BRICK MANUFACTURING CO.

PEARSON'S CASE.

Company—Director—Solicitor—Right to costs—Contributory—Set-off.

Where a director, who was also president, of a company was appointed by the board of directors and acted as solicitor for the company :—

Held, in winding-up proceedings, that he was entitled to profit costs in respect of causes in Court conducted by him as solicitor for the company, but not in respect of business done out of Court, and was entitled to set off the amount of such costs against the amount of his liability as a shareholder.

Decision of the Master-in-Ordinary reversed.

Cradock v. Piper, 1 Macn. & G. 664, followed.

J. H. Denton, for James Pearson.

Frank Denton, for the liquidator.

COMMON PLEAS DIVISION.

[MEREDITH, C.J., AND ROSE, J., 2ND MARCH, 1895.]

REGINA v. MCGREGOR.

Justice of the peace—Territorial jurisdiction—Summary conviction—Warrant—Evidence—Criminal Code, s. 889—Costs of warrant—Criminal Code, ss. 559, 843—Exclusion of evidence—Criminal Code, s. 850—Liquor License Act, R. S. O. c. 194, s. 112, s.-s. 2—Sale by wife—Presumption—Rebuttal—Criminal Code, s. 13.

Upon a motion for a rule *nisi* to quash a summary conviction of the defendant by a stipendiary magistrate for selling liquor without license :—

Held, that although the conviction did not show on its face that the offence was committed at a place within the territorial jurisdiction of the magistrate, yet, as the warrant for the defendant's apprehension, which was returned upon *certiorari*, showed the complaint to be that the defendant sold liquor at a place within the magistrate's jurisdiction, and it was to be inferred

that the evidence returned was directed to that complaint, sufficient appeared to satisfy the Court that an offence of the nature described in the conviction was committed, over which the magistrate had jurisdiction, and therefore the conviction should not, having regard to s. 889 of the Criminal Code, 1892, be held invalid.

Regina v. Young, 5 O. R. 184 (a), distinguished.

Held, also, that, by the combined effect of ss. 559 and 843 of the Code, it was discretionary with the magistrate to issue either a summons or a warrant, as he might deem best; and therefore it was not a valid objection to the conviction that the magistrate included in the costs which the defendant was ordered to pay the costs of arresting and bringing her before the magistrate under the warrant.

Upon the defendant tendering herself as a witness on her own behalf, the magistrate stated that, in view of the evidence adduced by the prosecutor, a denial by the defendant on oath would not alter his opinion of her guilt, upon which her counsel did not further press for her examination; but her husband was examined and gave evidence denying the sale of the liquor.

Held, that there was no denial of the right of the defendant, under s. 850 of the Code, to make her full answer and defence.

The defendant was a married woman, and the sale of the liquor took place in the presence of her husband; but the evidence showed that she was the more active party, and she was the occupant of the premises on which the sale took place.

Held, having regard to R. S. O. c. 194, s. 112, s.-s. 2, that, even if the presumption that the sale was made through the compulsion of the husband had not been removed by s. 13 of the Code, it would have been rebutted by the circumstances.

Regina v. Williams, 42 U. C. R. 462, distinguished.

DuVernet, for the defendant.

REGINA v. PLOWS.

Provincial fisheries—Justice of the peace—Jurisdiction—Prosecution for penalty exceeding \$30—55 V. c. 10, ss. 19, 25, 26.

The defendant was convicted before one justice of the peace on an information charging him with fishing in a certain

stream without the permission of the proprietors, and taking therefrom 45 fish.

The defendant admitted the fishing, but denied the taking of the 45 fish, and was convicted of the former.

Held, that, inasmuch as under s. 19 of 55 V. c. 10 the penalty for the offence charged in the information exceeded \$30, and inasmuch as s. 26, read in connection with s. 25, requires that prosecutions under the Act where the penalty exceeds \$30 shall take place before a stipendiary or police magistrate, or two or more justices of the peace, or one justice and a fishery overseer, the conviction must be quashed.

Aylesworth, Q.C., for the defendant.

DuVernet, for the prosecutor.

[THE DIVISIONAL COURT, 2ND MARCH, 1895.]

STANDARD DRAIN PIPE CO. v. TOWN OF FORT
WILLIAM.

Venue—Change of—Convenience—Onus—Witnesses.

The plaintiff has the right to select the place of trial of the action, and the onus is upon the defendant to show that the preponderance of convenience is against the place so selected.

Per MEREDITH, C.J.—It would be more satisfactory if the practice were that *prima facie* the action should be tried in the county where the cause of action arose, leaving the onus upon the plaintiff to show a preponderance in favour of the place selected by him ; but the contrary practice is well settled.

Per ROSE, J.—The Court will not, upon an application to change the venue, enter into an inquiry as to the personal inconvenience of witnesses.

A. R. Lewis, Q.C., for the plaintiffs.

H. M. Mowat, for the defendants.

IN CHAMBERS.

[BOYD, C., 24TH JANUARY, 1895.]

In re OTTAWA MUNICIPAL ELECTION.

*Mandamus—County Judge—Recount of ballot papers—55 V. c. 42,
ss. 155-175.*

A mandamus to compel a County Judge to proceed with a recount refused where the ballot papers cast at a municipal election were found not sealed up as required by s. 155 of 55 V. c. 42.

In re Centre Wellington Election, 44 U. C. R. 182, referred to.

Held, also, that the provisions of s. 175 of the Act were not applicable.

Chrysler, Q.C., *A. Ferguson*, Q.C., and *Stuart Henderson*, for the applicants.

M. J. Gorman and *W. Wyld*, for the respondents.

[12TH MARCH, 1895.]

McCARTHY v. TOWNSHIP OF VESPRA.

*Pleading—Striking out defence—Notice of action—Municipal corporation
—R. S. O. c. 73.*

A municipal corporation is not entitled to notice of action under the Act to protect justices of the peace and others from vexatious actions, R. S. O. c. 73.

Hodkins v. Counties of Huron and Bruce, 8 E. & A. 169, followed.

Defence of want of such notice struck out upon summary application.

Pepler, Q.C., for the plaintiff.

Creswicke, for the defendants.

[15TH MARCH, 1895.]

In re GRAY.*Infant—Sale of lands—Estate tail—R. S. O. c. 137, s. 3.*

Application for a ruling as to whether the estate of an infant, being an estate tail in possession, could be sold under the Act respecting infants, R. S. O. c. 137.

J. H. Scott, Q.C., for the applicant, referred to ss. 3, 7, and 8 of R. S. O. c. 137; s. 6 of R. S. O. c. 103; and Rules 992 *et seq.*

J. Hoskin, Q.C., for the infant.

Boyd, C.—I think the Act applies to the case of an estate tail.

[16TH MARCH, 1895.]

HOGABOOM v. GILLIES.

Interpleader issue—"Action"—Rule 641 (c)—Leave to discontinue—Costs.

An interpleader proceeding is not an action; and Rule 641 (c), which enables the Court to "order the action to be discontinued," does not apply to interpleader issues.

Hamlyn v. Betteley, 6 Q. B. D. 63, and *Re Dyson*, 65 L. T. N. S. 488, followed.

Semble, that the execution creditor can abandon the seizure or the prosecution of the issue, but only on the terms of answering all costs.

C. Millar, for the execution creditor.

J. A. Macdonald, for the claimant.

BANK OF HAMILTON v. GEORGE.

Pleading—Striking out—Rule 1322 (387)—Action on promissory note—Defences.

Upon a summary application under Rule 1322 (387) to strike out defences on the ground that they disclose "no reasonable

answer," the Court is not to look upon the matter with the same strictness as upon demurrer; a party should not be lightly deprived of a ground of substantial defence by the summary process of a judgment in Chambers.

And in an action upon a promissory note defences of payment, estoppel by conduct, and a claim for equitable protection arising out of agreement, were allowed to remain on the record.

C. D. Scott, for the plaintiffs.

J. W. McCullough, for the defendants.

In re MARTIN.

Devolution of Estates Act—R. S. O. c. 108, s. 2—56 V. c. 20, s. 4—Retroactivity—Caution.

Application by the official guardian under Rule 1006 for a direction as to the application of the Devolution of Estates Act, where the death occurred after 1st July, 1886, and before the amending Act of 1891. The question was whether the provisions in 56 V. c. 20 as to the registration of cautions apply to cases in which probate has not been taken or letters of administration obtained till more than a year after the owner's death.

J. Hoskin, Q.C., official guardian.

BORD, C.—The scope and language of the Act is sufficient to apply to such cases. Section 2 provides protection for any who may acquire rights in the interim, so that the effect of a subsequent registration of caution is only to withdraw to or vest in the executor or administrator so much of the land as is properly available for the purposes of administration. The distinction made in *Re Baird*, 18 C. L. T. Occ. N. 277, is too subtle as between the two amending Acts as to Devolution of Estates. Granted that the Act of 1891 was not retroactive; yet the provisions of the Act of 1898 are so engrafted on the former Act as to make the declaration of s. 4 cast back the operation of both Acts so as to apply to all persons dying after 1st July, 1886 (R. S. O. c. 108, s. 2).

[ARMOUR, C.J., 12TH FEBRUARY, 1895.]

In re GRANT.

*Life insurance—R. S. O. c. 136. s. 6 (1)—51 V. c. 22, s. 3—53 V. c. 39, s. 6
—Wives and children—Policy—Will—Variance—Apportionment.*

Under s. 6 (1) of the Act to secure to wives and children the benefit of life insurance, R. S. O. c. 136, as amended by 51 V. c. 22, s. 3, and 53 V. c. 39, s. 6, the insured has no power to declare by his will that others than those for whose benefit he has effected the policy or declared it to be shall be entitled to the insurance money, nor to apportion it among others than those for whose benefit he has effected the policy or declared it to be.

J. J. Warren, for the executors.

H. Cassels, for the widow.

F. W. Harcourt, for the infants.

[11TH MARCH, 1895.]

In re BALL v. BELL.

Prohibition—Division Court—Mortgage—Contract or obligation to indemnify against—Action for interest only—Dividing cause of action—R. S. O. c. 51, s. 77.

Where the plaintiff conveyed land to the defendant subject to a mortgage, and after maturity of the mortgage paid the mortgagee two gales of interest accruing since maturity, which he sought to recover from the defendant by action in a Division Court:—

Held, that the contract or obligation of the defendant to indemnify the plaintiff was an entire one; the breach was either the not paying the mortgage when it fell due or not indemnifying the plaintiff against it, and it was an entire breach; the contract or obligation and the breach constituted one cause of action; the plaintiff had therefore divided his cause of action, contrary to s. 77 of the Division Courts Act, R. S. O. c. 51; and prohibition should be awarded.

N. F. Davidson, for the plaintiff.

S. W. McKeown, for the defendant.

[FERGUSON, J., 22ND MARCH, 1895.]

THIBAudeau v. HERBERT.*Security for costs—Order for—Setting aside—Admission of debt—Rule 1251.*

Where there was an admission by the defendant of the debt sued for, and the writ of summons was specially indorsed so as to enable the plaintiffs to move for judgment under Rule 739, an order for security for costs obtained by the defendant on præcipe, after appearance, the plaintiffs being out of the jurisdiction, was set aside, notwithstanding that the plaintiffs might have paid \$50 into Court under Rule 1251 and proceeded to move for judgment.

Doer v. Rand, 10 P. R. 165, followed.

Payne v. Newberry, 13 P. R. 854, not followed.

N. McCrimmon, for the plaintiffs.

J. H. Spence, for the defendant.

[ROBERTSON, J., 29TH MARCH, 1895.]

In re **MOORE v. FARQUHAR.**

Mandamus—Division Court—Application for new trial—Time—Judgment—Notice of judgment—R. S. O. c. 51, ss. 144, 145—57 V. c. 28, s. 4.

Motion by the defendant for an order in the nature of a *mandamus* directed to the second junior Judge of the County Court of the county of York commanding him to hear a motion by the defendant for a new trial of a plaint in a Division Court, which motion the Judge refused to hear because he considered he had no jurisdiction after the lapse of fourteen days from the delivery of judgment.

After the hearing of the plaint the Judge postponed his judgment and afterwards delivered it in writing to the clerk of the Court. By reason of a mistake of the clerk, the defendant was not notified of the judgment for several days after its delivery, and, assuming that the notification which he did receive (not dated) was promptly sent, he made his motion for a new trial just before the expiry of fourteen days from the date at which he received notification, and after the expiry of fourteen days from the actual delivery of judgment.

Section 145 of the Division Courts Act, R. S. O. c. 51, provides that "the Judge, upon the application of either party, within fourteen days after the trial . . . may grant a new trial."

Rule 288 (f) of the Revised Rules of the Division Courts, 1894, provides that "where, under the 144th section of the Act, judgment in writing is delivered at the clerk's office, application for a new trial may be made within fourteen days from the day of delivering such judgment."

By 57 V. c. 28, s. 4, an amendment was made to s. 144 of R. S. O. c. 51, which now reads: "The Judge in any case heard before him shall, openly in court and as soon as may be after the hearing, pronounce his decision, but if he is not prepared to pronounce a decision instanter, he may postpone judgment until it is convenient for him to give the same, when he shall forthwith send the same to the clerk of the Court, who shall, upon the receipt thereof by him, forthwith enter the judgment and notify the parties to the suit of the same; and such judgment shall be as effectual as if rendered in Court at the trial."

The motion for a *mandamus* was argued in Chambers on the 29th March, 1895.

W. R. Smyth, for the defendant.

Angus MacMurchy, for the plaintiff.

ROBERTSON, J., held that, in view of the amendment allowing judgment to be given without previously naming a day, and directing that the parties shall be notified, the fourteen days within which a party may move for a new trial do not begin to run until the day on which the party has notice of the judgment.

Ordered that a *mandamus* should issue in one week unless the Judge should see fit to act upon the opinion expressed. No costs.

In the Third Division Court in the County of Elgin.

[ERMATINGER, JUN. J., 27TH MARCH, 1895.]

FRANKLIN v. OWEN.

Division Court—Jurisdiction—Garnishing claim—Primary debtor abroad—Garnishees—Place of carrying on business—Cause of action—R. S. O. c. 51, s. 185—57 V. c. 28, s. 12.

The garnishees in a pre-judgment garnishing plaint in a Division Court were a benevolent society, the place of whose head office was not fixed by statute or charter.

Held, that they might properly be said to "carry on business" within the meaning of s. 185 of the Division Courts Act, R. S. O. c. 51, in the place where their principal financial officer resided and transacted their financial business.

Also, that the Court of the division in which the garnishees carried on business had jurisdiction notwithstanding that the cause of action arose elsewhere and the primary debtor resided elsewhere.

Also, having regard to the provisions of 57 V. c. 28, s. 12, that such Court had jurisdiction notwithstanding the residence of the primary debtor outside the Province of Ontario.

This was an action upon a joint and several promissory note for \$800 made by the primary debtor and her deceased husband, the primary creditor abandoning the excess over \$200. The Ancient Order of United Workmen and M. D. Carder, their Grand Recorder, were made garnishees before judgment, it being sought to attach in their hands the moneys due to the primary debtor under a beneficiary certificate upon the life of her deceased husband.

The primary debtor resided in Portland, Oregon, at the time the action was brought, and the promissory note sued on was signed by her at the city of Toronto, in the Province of Ontario.

The primary debtor and the garnishees objected to the jurisdiction, and a preliminary trial of the question of jurisdiction was held.

J. S. Robertson, for the primary creditor, contended that the garnishees carried on business in the city of St. Thomas, which is within the territory of the Third Division Court in the county of Elgin, and that Court therefore had jurisdiction.

J. B. Davidson, for the primary debtor.

Warren Totten, Q.C., for the garnishees.

ERMATINGER, JUN. J.—The defendant being resident in a foreign country, it is not contended that any Division Court in this Province would have jurisdiction but for the recent Act, 57 V. c. 28, s. 12, which reads as follows:—"When it is by the Division Courts Act provided that a claim may be entered, or an action brought, or that any person or persons may be sued in any Division Court, such action may be brought, notwithstanding that the residence of the defendant is, at the time of bringing the action, out of the Province of Ontario, and such action may be brought in the Division Court in which the cause of action arose," (*sic*) "and continued to completion in as full and effectual a manner as might have been the case if the defendant resided in the province."

It is not contended that M. D. Carder, who is named as a garnishee, is indebted to the primary debtor otherwise than as an official of the Ancient Order of United Workmen. He is the Grand Recorder of that Order, in which the late J. C. Owen held a beneficiary certificate payable to his widow, the primary debtor, for \$2,000, and the necessary proofs are all complete, payment being withheld merely pending these suits.

The Order is one incorporated under the Benevolent Societies Act, subject to Government inspection and making returns to the Government, and no place is mentioned in the charter where the head office is to be. The returns from all subordinate lodges are sent and all moneys are remitted to the Grand Recorder, who lives in St. Thomas, where the vault containing all the records is kept. All claims in Canada are paid from here. The moneys are banked at the Imperial Bank in St. Thomas, and the death claims are paid by cheque on this bank, though payable at any branch of the Imperial Bank, signed by four officers residing in Barrie, Ridgetown, London, and St. Thomas. After the cheques are marked by the bank at St. Thomas, they are transmitted to the subordinate lodge. The officers, and of course their places of residence, are subject to change at each annual session. The

Grand Recordship has never been changed, however, as I understand it, Mr. Carder having occupied that position and kept the records and bank account, etc., here from the first. The Grand Master Workman is the official head of the Order, and the present incumbent is a resident of Barrie.

It is contended that the Order does not "carry on business" here within the meaning of s. 185 of the Division Courts Act, R. S. O. c. 51, because the Recorder may be changed, and the office and records be removed from here, by vote of the Grand Lodge. That is true of all incorporated concerns whose place of business is not fixed by statute or charter. The question is whether the Order is now carrying on business here, not whether they may be next year, or the year after. They are carrying on what is tantamount to a general life insurance business, and are carrying it on here, if anywhere in Ontario. I think they carry on business here within the meaning of s. 185 and of the authorities, some of which are collected in Bicknell and Seager's Division Courts Act, pp. 113, 114. . . .

Section 12 of 57 V. c. 23 is unfortunately very loosely drawn, and though the general intention is apparent, namely, to give jurisdiction to Division Courts notwithstanding defendants being resident without the province, it is equally apparent that the provision will be of no use in a large class of cases, namely, those ordinary suits where the cause of action has arisen in more than one division, and in which the only alternative guide to fix the venue is the defendant's residence. Where that is outside the province, it is obvious that there is nothing to fix the jurisdiction in any one division, and s. 12 supplies nothing.

. . . Had the section ended with the words "Province of Ontario" in the sixth line, it would have presented less difficulty. The question is whether what follows those words modifies and governs the first part of the section, restricting its operation to cases brought in the division in which the cause of action arose; in other words, whether the word "may" in the sixth line is to be construed as "must" or "shall," or whether it is simply permissive in the sense of not restricting the benefits of the section solely to the class of cases which can be brought or entered within the division where the cause of action arose. . . .

Will it be more consistent with the context and with the object and intent of the Act to read the words "and such action may be brought in the Division Court in which

the cause of action arose," as, "but such action shall be brought in the Division Court in which the cause of action arose," or to read them with some such proviso as "or in any other Division Court which has, according to the Division Courts Act, without regard to the defendant's residence, jurisdiction in the premises." It seems to me that this latter reading would be less inconsistent with the object and intent of the Act and with the context than the former. . . . The doctrine of beneficial construction—Maxwell on Statutes, 2nd ed., p. 84—may well apply here, where the object and scope of the Act seem so clear, even though the language may fall short of that object. The doctrine of strict construction usually applied to matters of Court procedure has, I conceive, no bearing against the plaintiff here, since a strict construction does not require that the word "may" be rendered imperative, especially in face of the Interpretation Act, R. S. O. c. 1, s. 7, and s. 8, s.-s. 2.

Assuming then that the Act of 1894 does not require that in all cases the action against a non-resident defendant must be brought where the cause of action arose, it remains for me to consider whether the effect of that Act, combined with s. 185 of the Division Courts Act, is to give this Court jurisdiction in this case.

The weightiest argument put forward for the primary debtor and garnishee appears to be based upon an observation made by Hagarty, C.J., in *Re Holland v. Wallace*, 8 P. R. 188, suggestive of some doubts as to whether "the existence of a true garnishee and a garnishable debt gives jurisdiction not otherwise existing against a primary debtor." The learned Chief Justice expressly refrained from discussing or deciding the point . . . he merely intimated that it was open to discussion.

The question is, whether, where neither the primary debtor resides, nor the cause of action arose, within the division where the garnishee resides or carries on business, a summons can be issued under s. 185 and the primary debtor compelled to appear or have judgment go against him in that division.

The language of the statute seems plain enough to embrace such a case; but it is argued that the garnishee clauses of the statute are all intended to be merely ancillary, so to speak, to the

jurisdiction of the Division Courts as limited by s. 81. . . A strong argument is founded on the ground of the inconvenience to which a defendant may be put in being summoned a long distance to answer a claim in a division where a garnishee may reside. . . I cannot see that his convenience is alone to be regarded. . . The legislature must be taken to have weighed the convenience and inconvenience likely to arise from their enactment. . . Section 185 says : " Where judgment has not been recovered for the claim of the primary creditor, he may cause a summons to be issued out of the Division Court of the division in which the . . . garnishees live or carry on business." Section 187 provides for judgment and execution against the primary debtor when served ; nothing is said as to where the cause of action arose or the defendant resides. Must we read into s. 185 a proviso restricting its operation to cases within s. 81 ?

Section 80 says : " When it is by this Act provided that a claim may be entered, or an action brought, or that any person may be sued in any Division Court . . . such Court shall have jurisdiction in the premises," etc.

It appears to me that s. 80, when read with s. 185, covers a case such as this, leaving out the question as to the primary debtor's residence being now without the Province. The solution of the latter question depends upon s. 12 of the Act of last session, by which jurisdiction is given notwithstanding the residence of the defendant abroad. The garnishee clauses do not speak of a defendant *eo nomine*. A garnishee has been held not to be a defendant in *Re Holland v. Wallace*, supra, and not to be examinable as such in *Re Hanna v. Coulson*, 21 A. R. 692, though since rendered so by statute. In the latter case, as well as the former, however, the primary debtor is fully recognized as the defendant : see *per Osler, J.A.*, at p. 695 : and should, it seems to me, be so recognized under the Act of last session.

Judgment affirming the jurisdiction.

MANITOBA.**In the Queen's Bench.**

[TAYLOR, C.J., 18TH MARCH, 1895.]

In re HAMILTON TRUSTS.

Mortgage—Promissory note—Collateral security—Surety—Realization of securities—Rights of parties.

Appeal from the Master's report. By a certificate of title under the Real Property Act James Hamilton was declared to be owner in fee of two lots of land, 28 and 29. He was the beneficial owner of lot 28, but as to lot 29 he was simply a trustee for his brother John Hamilton. By another certificate of title John Hamilton was declared to be the owner in fee of lot 18 according to the same plan. In July, 1890, they made a mortgage of the three lots to the Manitoba and North-West Loan Company for securing payment of \$1,850 and interest, and covenanted jointly and severally for the repayment of the money. Of the sum secured by this mortgage the indebtedness of James Hamilton in respect of lot 28 and the building upon it was \$390, and the indebtedness of John Hamilton in respect of lots 29 and 18 and the buildings upon them was \$960.

In May, 1891, John Hamilton borrowed from E. L. Drewry \$200, for which a promissory note was given payable three months after date and signed by James Hamilton, John Hamilton, and the wife of John. At the same time James and John made a mortgage to Drewry upon lots 28, 29, and 18 as collateral security for the payment of the promissory note. This also contained their joint and several covenant for payment of the money. In signing the promissory note and making the mortgage on lot 28, James was merely a surety for John.

In February, 1894, John Hamilton obtained a further advance from Drewry, as security for the repayment of which he

and his wife gave a mortgage on lot 18 as collateral security to a chattel mortgage.

In July, 1894, the loan company exercised a power of sale in their mortgage and sold lot 28 for \$780; lot 29 for \$660; and lot 18 for \$440. After deducting the amount due them and certain costs there remained \$508.56, which was paid into Court under the Trustee Act by the loan company; both James Hamilton and Drewry claiming to be entitled to it. Upon the petition of James Hamilton an order was made directing the Master to inquire and state who were entitled to the money in Court, to what amount, and in what order of priority.

The Master by his report found that there was due upon the promissory note and mortgage given as collateral to it \$189.20, and that of the remainder of the money in Court there was \$78.59 attributable to lot 18; to lot 28, \$180.48; and to lot 29, \$110.84. He further found James Hamilton entitled to \$180.48 and Drewry entitled to all the rest.

From this report James Hamilton appealed. He admitted that Drewry was entitled to be paid the \$189.20 due on the promissory note, but claimed the remainder of the money, because he said that on the mortgage to the loan company he was a surety for John as to all the money originally borrowed, except the \$890 which he himself owed; and that at the time when the company sold the land all he owed was \$196; by becoming surety to Drewry for the \$200 advanced on the promissory note he acquired a charge on lots 29 and 18 for the amount for which he became surety and liable to pay, and no further advance made by Drewry could possibly have priority over the lien and charge he so acquired. He claimed that as a result of the sale by the loan company he had paid \$584 more than his share of the debt.

Held, that in the present case there was no contract of suretyship properly so called, no agreement to constitute the relation of principal and surety to which the creditor was a party. It was between the debtor and the surety only that any agreement that the latter should become surety existed. On the note and the mortgage the surety was a principal debtor. The creditor had notice that the brother was a surety, but that alone did not give the surety greater rights: *Re Toogood Legacy*, 61 L. T. N. S. 19; *Duncan v. North and South Wales Bank*, 6 App.

could not offer any evidence to take the case out of the statute, not having specially replied; citing *Kemp v. Gibbon*, 9 Q. B. 609, 12 Q. B. 662; *Forsythe v. Bristowe*, 8 Ex. 847. The contention was that the statute began to run on 1st July, 1888, the day on which the first instalment of interest became payable.

Held, that the plaintiffs had not to reply and prove something which would take the case out of the statute, but it was upon the defendant to prove his plea by showing such default as to bring the case within the statute, and he had offered no evidence in support of it.

Held, also, that the fourth and fifth pleas did not raise a question of *ultra vires*, but simply denied the existence of the plaintiffs as a corporation. This defence was not open to the defendant; for a man cannot set up the incapacity of the party with whom he contracted, in bar of an action by that party for breach of the contract, and there is no exception in the case of a corporation not prohibited by law from doing the act in question.

Howell, Q.C., and *Machray*, for the plaintiffs.

Culver, Q.C., for the defendant.

[DUBUC, J., 29TH MARCH, 1895.]

WOOLLACOTT v. WINNIPEG ELECTRIC STREET
RAILWAY CO.

Jury—Application for—Action for damages—Special circumstances.

Application by the plaintiff for a jury. The plaintiff was struck by a car of the defendants, and brought this action to recover damages for the injuries sustained. The affidavits filed by him stated that the evidence to be given at the trial would be of a conflicting character. The affidavits filed by the defendants stated that there probably would not be more than five or six witnesses who saw the accident and could speak as to the speed at which the car was running at the time, and the defendants' attorney swore that, in his belief, questions of a legal nature would arise at the trial and would require to be disposed of.

Assuming that, as the learned Judge held, the description was insufficient, there was a view of the case that was not suggested to the Judge, which, it was claimed, entitled the plaintiff to a verdict notwithstanding the imperfect description, and this was that the evidence showed that the defendant admitted at the trial that he knew of the sale from Robertson to Bell, and that there was as between Robertson and Bell an actual and continued change of possession. Before the sale the defendant had worked for Bell and Robertson, but on the day of the transfer Robertson told the defendant he had transferred the business and had gone out of it, and on that day the defendant hired with Bell, and after that worked for Bell only and looked to him for his wages.

Held, that the verdict entered for the defendant in the County Court should be set aside and a verdict entered for the plaintiff with costs. As the defendant knew there was an actual sale and an actual change of possession, there was a valid sale as against him, even if the description in the bill of sale that was filed did not comply with the statute: *Danford v. Danford*, 8 A. R. 518. As the ground on which the plaintiff was entitled to have the verdict entered for her was not suggested to the County Court Judge, the plaintiff should not be allowed the costs of the appeal.

Wilson and Sutherland, for the plaintiff.

Anderson, for the defendant.

MARTIN v. NORTHERN PACIFIC EXPRESS COMPANY.

*Common carrier—Receipt given by consignee, but no actual delivery proved—
Loss of money package.*

The plaintiffs delivered to the defendants in Winnipeg a package containing \$2,000 in bank notes to be forwarded and delivered to J. J. Story, the plaintiffs' agent at Wawanessa, Man., to whom it was addressed. The plaintiffs claimed that the package had not been delivered by the defendants, and, having made a demand for the return of the money, brought this action to recover the amount as money had and received by the defendants for the use of the plaintiffs.

Supreme Court of Canada.

EXCHEQUER COURT.]

[15TH JANUARY, 1895.]

DEKUYPER v. VANDULKEN.

Trade-mark—Infringement—Exactness of description of device or mark—Use of same by trade before registration—Effect of—Rectification of register.

In the certificate of registration the plaintiffs' trade-mark was described as consisting of "the representation of an anchor with the letters 'J. D. K. & Z.,' or the words 'John DeKuyper & Son, Rotterdam, etc.,' as per the annexed drawings and application." In the application the trade-mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the letters "J. D. K. & Z.," or the words "John DeKuyper & Son, Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels, and other packages containing geneva sold by the plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *fac simile* of which was attached to the application, but there was no express claim of the label itself as a trade-mark. This label was white and in the shape of, a heart with an ornamental border of the same shape, and on the label was printed the device or representation of an anchor with the letters "J. D. K. & Z." and the words "John DeKuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva," which, it was admitted, were common to the trade.

The defendants' trade-mark was described in the certificate of registration as, "consisting of an eagle having at the feet 'V. D. W. & Co. ;' above the eagle being written the words 'Finest Hollands Geneva ;' on each side are the two faces of a medal ; underneath on a scroll the name of the firm 'VanDulken, Wieland, & Co. ;' and the word 'Schiedam ;' and lastly, at the bottom, the two faces of a third medal, the whole on a label in

QUEBEC.]

[9TH OCTOBER, 1894.]

HEREFORD R. W. CO. v. REGINAM.

Crown—51 & 52 V. c. 91, s. 9—Railway subsidy—Discretionary power of Lieutenant-Governor in Council—Petition of right—Misappropriation of subsidy moneys by order in council.

Where money is granted by the legislature, and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right.

The appellant railway company alleged by petition of right that, by virtue of 51 & 52 V. c. 91, the Lieutenant-Governor in Council was authorized to grant 4,000 acres of land per mile for 80 miles of the Hereford railway; that by an order in council dated 6th August, 1888, the land subsidy was converted into a money subsidy, s. 9 of 51 & 52 V. c. 91 enacting that "it shall be lawful," etc., to convert; that the company completed the construction of their line of railway, relying upon the subsidy and order in council, and built the railway in accordance with 51 & 52 V. c. 91, and the provisions of the Railway Act of Canada, 51 V. c. 29, and they claimed to be entitled to the sum of \$49,000, the balance due on the subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded, *inter alia*, that the money had been paid by order in council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties, and signed a receipt for the balance of \$6,500 due on account of the first subsidy. The petition of right was dismissed.

Held, affirming the judgment of the Court below, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company, enforceable by petition of right; TASCHEREAU and SPODOWICK, JJ., dissenting; but, assuming it did, the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy; and payment by the Crown of the sub-contractors' claim out of

CALDWELL v. ACCIDENT INSURANCE COMPANY.

Evidence—Partnership—Registered declaration—Art. 1834, C. C.—Oral evidence inadmissible—Life policy.

In an action upon a life policy to recover the amount payable to the surviving partners upon the death of one of the partners, a notarial dissolution of the partnership duly registered, as well as a declaration of a new partnership, of which the deceased was not a member, and duly registered as provided by Art. 1834, C. C., was set up as a defence to the action, and evidence was tendered to show that the deceased had continued to be a member up to the time of his death.

Held, affirming the judgment of the Court below, that oral evidence to contradict such declaration was inadmissible, and that the action was properly dismissed.

Abbott, Q.C., and Geoffrion, Q.C., for the appellant.

Cross, Q.C., for the respondents.

WEBSTER v. CITY OF SHERBROOKE.

Assessment and taxes—Municipal corporations—By-law—Special tax—Quebec License Law—55 & 56 V. c. 51, s. 55—Powers of taxation.

By virtue of the first clause of a by-law passed under 55 & 56 V. c. 51, an Act consolidating the charter of the city of Sherbrooke, the appellant was taxed five cents on the dollar on the annual value of the premises in which he carried on his occupation as a dealer in spirituous liquors, and, in addition thereto, under the third clause of the same by-law, was taxed a special tax of \$200 for the same occupation. The Act 55 & 56 V. c. 51 provides, at the end of s.-s. *g*, one of the sub-sections of s. 55, enumerating the kinds of taxes authorized to be imposed, "the whole, however, subject to the provisions of the Quebec License Law." Art. 297, R. S. P. Q., limits the powers of taxation by any municipal council of a city to \$200 upon holders of licenses.

Held, affirming the judgment of the Court below, that the power granted by 55 & 56 V. c. 51 to impose the several taxes was independent and cumulative, and as the special tax did not

and properly, as he would if the said property was his own, and bargain and sell the said property for the best price that can be had for the same, and pay the rent, interest, and purchase money when sold, and all the avails of the said property, to the purchaser to the amount of \$2,940, and interest at the rate of eight per cent. per annum from the date of these presents, and then the said purchaser shall re-deed to the vendor any part of the said property that may remain unsold after receiving the aforesaid amount and interest."

The vendor was at the time indebted to the purchaser in the sum of \$2,941. The two documents were registered. The vendor had other properties and gave the purchaser a power of attorney to convey all his real estate in the same locality. The term of three years mentioned in the *contre lettre* was continued by mutual consent. The vendor subsequently paid amounts on account of his general indebtedness to the purchaser. It was only after the purchaser's death that the vendor claimed from the heirs of the purchaser the balance, above mentioned, of \$1,470, as owing to him for the management of his properties.

Held, reversing the judgment of the Court of Queen's Bench, and restoring the judgment of the Superior Court, that the proper construction of the contract was to be gathered from both documents and dealings of the parties, and that the property having been deeded merely as security, it was not an absolute sale, and that the plaintiff was not M. S.'s agent in respect of his property.

Held, also, that the only action the plaintiff had was the *actio mandata contraria*, with a tender of his *reddition de comptes*.

Geoffrion, Q.C., and *Buchan*, for the appellants.

H. B. Brown, Q.C., for the respondent.

[1st MARCH, 1895.]

ARPIN v. MERCHANTS BANK OF CANADA.

Appeal—Procedure—Regularity of ven. ex.

A judgment of the Court of Queen's Bench for Lower Canada (appeal side) held that a *renditioni exponas* issued by the Superior Court of Montreal, to which Court the record in a

trust for the benefit of his creditors. The assignee took possession under the assignment.

Held, affirming the decision of the Supreme Court of Nova Scotia, that there was no delivery to the mortgagees under the mortgage which transferred to them the possession of the goods.

The Bills of Sale Act, R. S. N. S., 5th ser., c. 92, by s. 4 requires a mortgage given to secure an existing indebtedness to be accompanied by an affidavit in the form prescribed in a schedule to the Act, and by s. 5, if the mortgage is to secure a debt not matured, the affidavit must follow another form. By s. 11 either affidavit must be "as nearly as may be" in the forms prescribed. A mortgage was given to secure both a present and future indebtedness and was accompanied by a single affidavit combining the main features of both forms.

Held, affirming the decision of the Court below, GWYNNE, J., dissenting, that this affidavit was not "as nearly as may be" in the forms prescribed; that there would have been no difficulty in complying strictly with the requirements of the Act; and though the legal effect might have been the same, the mortgage was void for want of such compliance.

Russell, Q.C., for the appellant.

Borden, Q.C., and *Roscoe*, for the respondent.

Exchequer Court of Canada.

[BURBIDGE, J., 29TH OCTOBER, 1894.]

LANDRY v. RAY.

Appeal—Admiralty—Judgment of local Judge—Finding of fact.

On appeal from a judgment of a local Judge in Admiralty, under s. 14 of the Admiralty Act, 54 & 55 V. c. 29, the Court will not interfere with a finding of fact, unless satisfied beyond

By item 673 of R. S. C. c. 38 "jute cloth, as taken from the loom, neither pressed, mangled, calendered, nor in any way finished, and not less than 40 inches wide, when imported by manufacturers of jute bags for use in their own factories," was made free of duty.

By item 261 of such Act it was provided that manufactures of jute, not elsewhere specified, should be subject to a duty of twenty per cent. *ad valorem*. The claimants, who were manufacturers of jute bags, had for a number of years imported into Canada jute cloth cropped after it was taken from the loom. It was, amongst others, a reasonable construction of item 673 that the jute cloth so cropped should be entered free of duty, and in this construction the importers and the officers of customs had concurred during such period of importation.

Held, that, notwithstanding the provisions of the interpretation clause (m) of s. 2, R. S. C. c. 32, inasmuch as the cloth in question had been, in good faith, entered as free of duty and manufactured into jute bags and sold, and it would happen that if another construction than that so adopted by the importers and customs officers was now put upon the statute, the whole burden of the duty would fall upon the importers, the doubt as to such construction should be resolved in their favour.

Quare, whether the words used in s. 188 of the Customs Act, R. S. C. c. 32, as amended by 51 V. c. 14, s. 84, "the Court . . . shall decide according to the right of the matter," were intended by the legislature in any way or case to free the Court from following the strict letter of the law, and to give it a discretion to depart therefrom, if the enforcement, in a particular case, of the letter of the law would, in the opinion of the Court, work injustice.

D. MacMaster, Q.C., and F. S. MacLennan, for the claimants.

W. D. Hogg, Q.C., for the Crown.

[4TH MARCH, 1895.]

COOMBS v. REGINAM.

Contract—Common carrier—Railway passenger's ticket—Condition printed on face—No stop over—Continuous journey.

The suppliant, who was a manufacturer's agent and traveller, purchased an excursion ticket for a passage over

the Intercolonial railway between certain points and return within a specified time. On the going half, printed in capitals, were the words, "good on date of issue only," and immediately thereunder in full-faced type "no stop over allowed." He knew there was printing on the ticket, but put it into his pocket without reading it. He began the journey on the same day he purchased the ticket, but stopped off for the night at a station about half-way from his destination on the going journey. The next morning he attempted to continue his journey to such destination by a regular passenger train. Being asked for his ticket, he presented the one on which he had travelled the evening before, and was told by the conductor that it was good for a continuous passage only. On his refusal to pay the prescribed fare for the rest of the going journey, the conductor put him off the train at a proper place, using no unnecessary force therefor.

Held, that issuing to the suppliant a ticket with the condition plainly and distinctly printed upon the face of it was in itself reasonably sufficient notice of the conditions upon which such ticket was issued; and if, under the circumstances, he saw fit to put the ticket into his pocket without reading it, he had nothing to complain of except his own carelessness or indifference.

C. N. Skinner, Q.C., and H. A. McKeown, for the suppliant.

H. L. Newcombe, Q.C., and J. A. Belyea, for the Crown.

[18TH MARCH, 1895.]

REGINA v. ST. JOHN GAS COMPANY.

Harbour—B. N. A. Act, s. 108; schedule 3—Public rights—Fisheries—Draining into harbour—Noxious matter—Nuisance—8 V. c. 39, s. 16 (N.B.)—40 V. c. 38 (N.B.)—Information.

The harbour of the city of St. John is not one of the public harbours which by virtue of s. 108 and schedule 3 of the British North America Act, 1867, became at the union the property of Canada. It is vested in the corporation of the city of St. John, who are the conservators thereof, and who have certain rights of fishing therein for the benefit of the inhabitants of the city.

Notwithstanding such ownership of the harbour by the corporation of the city of St. John and their rights therein, the Attorney-General for Canada may file an information in this Court to restrain any interference with or injury to the public right of navigation or fishing in such harbour.

By an Act of Assembly of the Province of New Brunswick, 8 V. c. 89, s. 16, incorporating the defendants, they were prohibited from throwing or draining into the harbour of St. John any refuse of coal tar or other noxious substance that might arise from their gas works, under a penalty of £20.

Held, that the remedy so provided was cumulative, and that while the repeal of the provision might relieve the defendants from the penalty prescribed by the Act, such repeal would not legalize any nuisance they might commit by throwing or permitting to drain into the harbour the refuse of coal tar or other noxious substance that might result from the manufacture of gas at their works.

Seemle, that while an exemption granted by the Minister of Marine and Fisheries under 81 V. c. 80, s. 14, s.-s. 2, may be a good defence to a prosecution for the penalty therein prescribed, it would not afford a good answer to an information to restrain any person from throwing any poisonous or deleterious substance into waters frequented by fish, if the act complained of constituted an injury to or interference with some right of fishing existing in such waters.

By an Act of Assembly of the Province of New Brunswick, 40 V. c. 88, authority was given to the defendants to construct a sewer, with the sanction of the Governor-General of Canada, which was obtained, from their gas works to the harbour, for the purpose of carrying off the refuse water from such works; it was further provided by the Act that the drain should be laid under the supervision of the common council of the city, and that no discharge therefrom should take place or be made except upon the ebbing of the tide, and at such times during the ebbing of the tide as the common council should direct. After the drain was constructed it appeared that at times tar had been suffered to escape with the refuse water through the drain into the harbour, but that the discharge of refuse water, when separated from the tar, had not been injurious to the fisheries carried on in the harbour.

Under these circumstance, the Court granted an order restraining the discharge of tar and other noxious substances through the drain by the defendants, and further restraining them from allowing any discharge therefrom except at the ebbing of the tide, and at such times during the ebbing of the tide as the common council of the city of St. John might direct.

Held, that whilst the legislature of New Brunswick could not at the time of the passage of the Act of Assembly, 40 V. c. 38, legalize such an interference with or injury to the right of navigation or fishery as would amount to a nuisance, they could authorize the construction of a drain to carry the refuse water from the defendants' works to the harbour, and, so long as the discharge of such refuse water through the drain did not amount to a nuisance, there was no ground upon which to enjoin the defendant company to remove their sewer or to abandon the use of it.

J. G. Forbes, Q.C., and L. H. Currie, for the Crown.

J. D. Hazen, for the defendants.

[1st APRIL, 1895.]

REGINA v. MONTREAL WOOLLEN MILL CO.

Pleading—Incidental demand—Counter-claim—Substantive cause of action.

Upon motion by the Crown to set aside the defendants' pleading:—

Held, that a substantive cause of action cannot be pleaded as an incidental demand or counter-claim to an information by the Crown. See 50 & 51 V. c. 16, s. 23.

W. D. Hogg, Q.C., for the Crown.

F. S. MacLennan, for the defendants.

[DAVIDSON, J., 20th DECEMBER, 1894.]

REGINA v. MISSISSIPPI AND DOMINION STEAMSHIP COMPANY.

Navigation—Obstruction of—37 V. c. 29—43 V. c. 30—Pleading—Allegation of negligence—Demurrer.

Upon demurrer to an information for the recovery of moneys paid out by the Crown for the removal of an obstruction to

navigation, heard before DAVIDSON, J., as a Judge of the Exchequer Court *pro hac vice* :—

Held, that where a ship has become a wreck, and, owing to her position, constitutes an obstruction to navigation, it is not necessary in an information against the owners for the recovery of moneys paid out by the Crown, under the provisions of 37 V. c. 29 and 43 V. c. 80, for removing the obstruction, to allege negligence or wrong-doing against the owners in relation to the existence of such obstruction.

Under the Acts above mentioned it is only the owner of the ship or thing at the time of its removal by the Crown who is responsible for the payment of the expenses of such removal.

The right of the Crown to charge the owner with the expenses of lighting a wrecked ship during the time it constitutes an obstruction was first given by 49 V. c. 86, and such expenses could not be recovered under 37 V. c. 29, or 43 V. c. 80.

W. D. Hogg, Q.C., for the Crown.

W. Cook, Q.C., for the defendants.

ONTARIO.

Supreme Court of Judicature.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 2ND MARCH, 1895.]

THIBAudeau v. PAUL.

Sale of goods—Book debts—Agreement to sell—Property not to pass—Attacking creditors—Rights of assignee—R. S. O. c. 125—55 V. c. 86.

K. M. & Co., by agreement in writing dated 28th February, 1891, sold a business stock to P. and agreed to keep him

supplied with goods, but stipulated that no property in the same should pass until they were paid for. On 20th December, 1892, P., by another agreement in writing, assigned his book debts to K. M. & Co. K. M. & Co. took possession of the stock on the same day that P. made an assignment for the benefit of creditors, but before they were aware that he had done so. The assignee, when he subsequently got possession, notified the debtors to pay him. Neither instrument was filed under the Bills of Sale Act.

Held, affirming the judgment of BORD, C., that book debts are not within the provisions of R. S. O. c. 125, and that the language of 55 V. c. 26 is not explicit enough to induce the conclusion that it was intended to widen the law as to the character of the property being dealt with, and it appears to relate to future acquired property akin to property to which R. S. O. c. 125 applies.

Held, also, that the second agreement, although subsequent to 55 V. c. 26, was not affected by it, and that the first agreement was not within R. S. O. c. 125, and stood independently of the later Act as a prior transaction.

Held, also, that 55 V. c. 26 does not give simple contract creditors the same status as execution creditors for all purposes, but only as a basis of attack upon instruments which from lack of form or substance are not protected by registration under R. S. O. c. 125.

Held, also, that 55 V. c. 26 has not a retrospective operation.

Held, also, that an assignee under R. S. O. c. 124 is in no better position than his assignor as to property assigned, and cannot be looked upon as a purchaser for value; and in this case the assignee took the book debts subject to the equitable right of K. M. & Co. under the agreement of 20th December, 1892.

Clute, Q.C., and *J. A. Mills*, for the plaintiffs.

Moss, Q.C., and *W. F. Walker*, Q.C., for the defendants *Knox, Morgan, & Co.*

McVICAR v. TOWN OF PORT ARTHUR.

Public Parks Act—Purchase money for lands taken—Liability for—How obtained—Agency of board for corporation—R. S. O. c. 190.

Where the plaintiff's land was taken by a board of park management of a town under the powers given by the Public Parks Act, R. S. O. c. 190, and she sought in this action to recover the amount of an order given by the board on the town treasurer in payment for the land:—

Held, reversing the judgment of ROBERTSON, J., that by the passing of a by-law adopting the Public Parks Act, the town corporation gave in effect antecedent authority for the doing of anything authorized to be done by the provisions of that Act, including the purchase by the board of "the lands, rights and privileges needful for park purposes:" s. 18 (1).

2. That the effect of the Public Parks Act is to make the board the statutory agents of the city or town for the purchase of such lands, rights and privileges, and to take the title of all lands purchased to the city or town, and the necessary inference from the Act is that the city or town is bound to pay for lands so purchased for it by their agents, the board.

3. That, although the council of the city or town may raise, by a special issue of debentures under s. 17, s.-s. 4, of the Act, the sums required for the purchase of lands, they are not compelled to adopt that course or confined to it, but may pay such purchase money out of the general funds of the city or town.

4. That the plaintiff had no remedy against the board, as it had performed its whole duty in purchasing her land, taking the title to the corporation, and giving an order for the purchase money, but had a remedy against the corporation, whether it sold its park fund debentures or not, and was not concerned with the method to be adopted by the corporation in procuring the money.

Aylesworth, Q.C., for the plaintiff.

A. S. Wink and D. W. Saunders, for the defendants.

[STREET, J., 18TH MARCH, 1895.]

BRABANT v. LALONDE.

Will—Construction—"Nearest of kin"—Period of ascertainment—Tenants in common—"Then"—Dower—Election.

In the absence of any controlling context, the persons entitled under the description "nearest of kin" in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale.

And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, and provided that in the event of the latter dying without issue, "then in that case" it should be equally divided between his "nearest of kin;" and the daughter died while still an infant and unmarried:—

Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance, she was nevertheless entitled as one of the "nearest of kin;" and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common.

Bullock v. Downes, 9 H. L. C. 1; *Mortimore v. Mortimore*, 4 App. Cas. 448; and *Re Ford, Patten v. Sparks*, 72 L. T. N. S. 5, followed.

The word "then," introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression "in that case," which followed it, and it did not affect the construction of the will.

The widow remained in possession after the death of the testator with her infant daughter, whom she supported out of the rents until an order was made under R. S. O. c. 137 permitting her to lease the farm, to retain one-third of the rents for herself as dowress, and to apply the remaining two-thirds in supporting the infant.

Held, that she was put to her election by the terms of the will, but that she had not elected to take under it, and was

therefore entitled to dower out of the farm in addition to one-third in fee simple.

Colin G. O'Brian, for the plaintiff.

N. A. Belcourt, for the defendants J. B. and O. Lalonde.

John Maxwell, for the infant defendants.

CHANCERY DIVISION.

[BOYD, C., 14TH MARCH, 1895.]

In re EAST AND WEST WAWANOSH UNION SCHOOL SECTION.

Public schools—Re-adjustment of boundaries of union school section—Arbitration—Finality of award.

The intention of the Public Schools Act, 1891, ss. 87, 88, is to make an award dealing with the adjustment or re-adjustment of the boundaries of a Union School Section conclusive of the question for five years after the award goes into operation, even though the decision of the arbitrators be that no change be made in the boundaries. The test as to whether a change should or should not be made is not to be applied oftener than quinquennially.

J. R. Cartwright, Q.C., for the Minister of Education.

IN CHAMBERS.

[BOYD, C., 11TH MARCH, 1895.]

TREVELYAN v. MYERS.

Security for costs—Præcipe order—Increased security—Election—Delay.

Motion by the defendant for increased security for costs.

The plaintiffs lived in England, and the defendant in Ontario. This action was brought upon a covenant for \$5,500

contained in a mortgage made by the defendant over lands in England. The defendant obtained upon præcipe an order for security for costs, with which the plaintiffs complied by paying \$200 into Court.

More than six years before the commencement of this action the plaintiffs had brought an action in England and obtained judgment against the defendant upon the covenant.

The defendant set up as an answer to this action that the cause of action was merged in the English judgment, and also that the plaintiffs had agreed to take the mortgaged lands in full satisfaction of the judgment.

On the 18th September, 1894, the defendant moved for a commission to England to take evidence, and also to increase the security for costs to \$500.

The Master in Chambers made an order for the issue of a commission, but adjourned the application for increased security until after the return of the commission.

The defendant, however, did not proceed upon the order for a commission, and made no further application until after the action had been entered for trial at the Toronto spring sittings, 1895, when he again applied to the Master in Chambers for an order for increased security for costs.

The Master refused the application, and the defendant appealed.

O. M. Arnold, for the defendant.

W. H. Lockhart Gordon, for the plaintiffs.

BOYD, C.—I think the facts bring the case within the decision of *Bell v. Landon*, 9 P. R. 100. The defendant should have foreseen the necessity of a commission to England and of the costs being larger than usual, and, instead of taking the ordinary præcipe order for security, should have made a special application for security in a larger sum. Not having done so, he must now abide by his election. On this account, and also because it looks as if the application was made for delay, I dismiss the appeal with costs.

[12TH MARCH, 1895.]

REGINA *ex rel.* ST. LOUIS v. REAUME.

Municipal elections—Election of deputy-reeve—Irregular addition of names to voters' list—Voiding election.

The election of a deputy-reeve of a municipality was voided, on *quo warranto* proceedings, because, although he had a majority of sixty-six votes, he participated in a transaction by which on the Saturday before polling-day some eighty names were added to the voters' list over and above those certified by the Judge to be properly there.

Held, that the fact that, according to the marks on the polling-books, only some thirty-one of those whose names were so illegally added, cast votes, was not the standard by which to judge whether the result was or was not affected within the meaning of s. 175 of 55 V. c. 42. No one could say how the addition of these names operated on the voting constituency.

W. H. P. Clement, for the relator.

Aylesworth, Q.C., for the respondent.

[ARMOUR, C.J., 5TH APRIL, 1895.]

FEWSTER v. TOWNSHIP OF RALEIGH.

Costs—Scale of—Drainage—Action—Reference—54 V. c. 51, s. 24 (3).

Action brought in the High Court of Justice in 1890 to recover damages for injuries caused to the plaintiff's lands by reason of the negligent construction of certain drains by the defendants and by reason of their omission to keep such drains in repair, and for a *mandamus*.

After a judgment referring the action to a special referee, set aside by the Court of Appeal: 14 P. R. 429: an order was made under s. 11 of the Drainage Trials Act, 1891, 54 V. c. 51, referring the action to the Drainage Referee, who made his report in favour of the plaintiff, assessing damages at over \$500 and allowing the plaintiff costs. He referred the taxation of the plaintiff's costs to the clerk of the County Court of the

county of Kent, who taxed them upon the scale of the County Courts.

The plaintiff appealed from the taxation, to a Judge of the High Court in Chambers.

W. H. Blake, for the plaintiff, contended that as the proceedings were begun by action in the High Court, and the Drainage Referee acquired his jurisdiction by an order of reference under s. 11 of 54 V. c. 51, and not by proceedings under ss. 5, 6, and 7, and as the amount recovered by the plaintiff was beyond the jurisdiction of the County Court, the costs should be on the scale of the High Court, relying on 55 V. c. 57, s. 6 (2), and 57 V. c. 56, s. 114.

H. W. Mickle, for the defendants, contended that no appeal lay from the taxation by the clerk of the County Court to a Judge of this Court, and that, at all events, the costs were properly taxed on the scale of the County Court, in accordance with 54 V. c. 51, s. 24 (3), and 57 V. c. 56, s. 109, no other tariff having been framed.

ARMOUR, C.J., held that the costs were properly taxed upon the County Court scale, no provision to the contrary having been made in the order of reference.

Appeal dismissed with costs.

[MACMAHON, J., 2ND APRIL, 1895.]

REGINA v. VERRAL,

Evidence—Foreign commission—Prosecution for indictable offence—Pendency of—Information—Preliminary inquiry—Criminal Code, s. 683—Witnesses—Materiality.

A prosecution for an indictable offence is pending within the meaning of s. 683 of the Criminal Code, 1892, when an information has been laid charging such an offence; and a commission to take evidence abroad for use before a magistrate upon a preliminary inquiry may then be ordered.

But the discretion of the Judge in ordering the issue of a commission is to be exercised upon a sworn statement of what it is expected the witnesses can prove, and he must be satisfied as to the materiality of the evidence.

And, under the circumstances of this case, a commission was granted to take the evidence of only one of three witnesses whom the Crown proposed to examine, it appearing that the other two had not been asked to come into the jurisdiction, and that their evidence would be in corroboration only of the statement of the third witness that he was with the defendant upon a certain occasion.

Dewart, for the Crown.

Biggs, Q.C., for the defendant.

[STREET, J., 6TH FEBRUARY, 1895.]

DUFTON v. HORNING.

Mechanics' liens—Mortgage—Jurisdiction under 53 V. c. 37—Increased value—Priorities—Address of lien-holder—56 V. c. 24, s. 11.

Under the Act to simplify proceedings for enforcing mechanics' liens, 53 V. c. 37, the remedy of a lien-holder as against a mortgagee is confined to the increased value provided for by R. S. O. c. 126, s. 5, s.-s. 3, and he cannot question the priority of the mortgage.

The name of the town and county in which a lien-holder resides is a sufficient address under s. 11 of 56 V. c. 24.

Furlong, for the plaintiffs.

W. H. Blake, for the defendant Malloch.

Ambrose, for the defendant Young.

MANITOBA.

In the Queen's Bench.

[KILLAM, J., 8TH APRIL, 1895.]

In re CROTHERS AND RURAL MUNICIPALITY OF
LOUISE.*Intoxicating liquors—By-law as to license fees—Local option—Ultra vires.*

Application to quash a by-law of a municipal corporation forbidding the receiving by the municipality of any money for a license for the sale of liquors within the limits of the municipality. The main question argued was as to the power of a Provincial Legislature to prohibit the sale of intoxicating liquors in the Province, and, incidentally, to authorize a municipality to do so within its limits.

Held, that the by-law must be treated as one directly prohibiting, in pursuance of provincial legislation, the issue of a license for sale of any intoxicating liquors within the municipality. While the ordinary meaning of the language in the by-law related only to the receipt of money, the statute really gave the words a different meaning, and excluded such natural meaning. The by-law was illegal upon its face; it practically prohibited the sale of intoxicating liquors in any way. As such, it was a direct infringement upon private rights, and, to the extent to which it went beyond a by-law of the character of that in question in *Re Huson and South Norwich*, 19 A. R. 348, 21 S. C. R. 669, and afterwards in the same Court, not yet reported, was *ultra vires* under the decision of the Supreme Court of Canada in *Re Local Option Act*, not yet reported. It was not possible to quash it in part; it was indivisible, good

entirely or not at all. Order made quashing the by-law, without costs.

Wade, for the applicant.

Hough, Q.C., for the municipality.

Maclean, for the Attorney-General.

[BAIN, J., 2ND APRIL, 1895.]

EDMUNDS v. O'BRIEN.

Covenant—Action on—Inadequacy of consideration—Fraudulent transaction—Undue advantage—Agreements set aside.

This action was brought to recover \$10,000 alleged to be due the plaintiff by the defendant on a covenant to pay that sum and interest, which was contained in two contracts or agreements made between plaintiff and defendant, dated respectively 18th September and 1st December, 1894.

The plaintiff had been carrying on a livery business in a stable on two lots in Brandon, of which lots he had formerly been the owner. The agreement was that he should sell the whole concern to the defendant for \$10,000, payable on 27th September, 1894. At the date of the agreement the plaintiff had no estate or interest in the land, but merely a charge on it under a third mortgage. The market value of the two lots, the stable or barn on them, and the livery outfit and business that the plaintiff carried on therein, was on the 18th September less than \$5,000. The plaintiff was a middle-aged man, who had dealt in horses for eight or ten years. The defendant was not twenty-two, intemperate in his habits, and of no business experience, and was ignorant and reckless in business matters. The plaintiff was aware that the defendant expected soon to have the command of money. The plaintiff agreed that upon payment of the purchase money, or so soon thereafter as title could be completed, he would convey and assure the lots to the defendant free from incumbrances. The effect of the agreement was that the defendant bound himself absolutely to pay the \$10,000 to the plaintiff on 27th September, getting nothing in return but the plaintiff's covenant that at some future time the plaintiff would procure a conveyance of the title of the lots to the defendant.

A bill of sale of the horses and other contents of the livery barn was executed by the plaintiff to the defendant, but no inventory or valuation was made; the documents were prepared by the plaintiff's solicitor. The defendant took charge of the stable and dealt with the property as if it belonged to him. The second agreement provided that the defendant should procure title to the lots and be allowed a sum of \$300 for the costs of the proceedings to be taken.

The plaintiff began this action on the 12th January, 1895, and afterwards had the defendant arrested on a *capias*.

The defendant defended the action on the ground, among others, that he was induced to enter into the agreements sued on by the fraud of the plaintiff; and he also sought to be relieved from his covenants on equitable grounds, claiming that he entered into the agreements recklessly and improvidently and without having had independent advice, and that an undue advantage was taken of him by the plaintiff.

Held, that the defendant was entitled to a verdict. The inadequacy of the consideration for the defendant's covenant was so great that, to use Lord Thurlow's words in *Gwynne v. Heaton*, 1 Bro. C. C. at p. 9. it was "impossible to state it to a man of common sense, without producing an exclamation at the inequality of it." Even if the defendant were not fraudulently imposed upon by the plaintiff, an undue advantage was taken of him by the plaintiff, and the latter should not be allowed to enforce the contract.

The onus lay on the plaintiff to prove that the defendant had entered into the transaction voluntarily and deliberately, knowing its nature and effect, and that his entering into it was not brought about by any undue advantage taken of his position or by undue influence exerted over him: *Murray v. Palmer*, 2 Sch. & Lef. 474; *Waters v. Donnelly*, 9 O. R. 391.

This he had entirely failed to do.

The contract between the plaintiff and the defendant set out in the two agreements and the bill of sale could not be enforced against the defendant. The parties should be restored to the position they were in when the contract was made.

In his equitable pleas the defendant submitted to make good any depreciation there was in the value of the chattel

property that he received and to account for the profits of the business for the time he was in charge of it.

Ordered, that the action should be transferred to the equity side of the Court, with a reference to the Master to take the accounts, if the parties could not agree on the amount the defendant should pay for depreciation and profits of the business.

The defendant would be entitled to the costs up to and including the trial ; subsequent costs reserved.

A. D. Cameron, for the plaintiff.

Coldwell, Q.C., Henderson, and Matheson, for the defendant.

NORTH-WEST TERRITORIES

In the Supreme Court.

IN CHAMBERS.

[SCOTT, J., 22ND MARCH, 1895.]

McCARTHY v. TRAVIS.

Evidence—Libel—Proof of loss of defamatory writing—Affidavits—Secondary evidence of contents—Examination for discovery.

In an action for libel the plaintiff, on the examination of the defendant for discovery, attempted to examine him as to the contents of the document containing the alleged libel.

The defendant refused to answer questions as to the contents unless and until the document itself was produced or its loss strictly proved.

ROULEAU, J., on reference to him, held that the objection was well taken, the *ipsissima verba* of the document being in question, and the proof of the libel required in such actions being of the strictest nature.

The examination for discovery having been adjourned, the plaintiff moved for an order allowing him to prove the loss of the document by the affidavits of certain officials of the *Free Press* newspaper in Winnipeg for the purpose of the trial, and also of the examination of the defendant for discovery. The defendant opposed the application.

The plaintiff, in person.

McCaul, Q.C., for the defendant.

SCOTT, J.—So far as the application relates to the use of the affidavit at the trial, I think I should not make the order applied for.

Patterson v. Wooler, 45 L. J. Ch. 274, appears to hold that such order should not be made if objected to by the opposite party, and, in view of the nature of the action and the importance of the document, I cannot hold that the defendant's objection to the mode of proof is not *bona fide*.

Then in this case the witnesses whose evidence is sought to be adduced by affidavit, being out of the jurisdiction, cannot be compelled to attend at the trial for cross-examination, and, although the plaintiff has offered to produce them for cross-examination upon their affidavits, yet I see no reason why in this case the ordinary procedure for obtaining their evidence for the trial, viz., under s. 245, should not be followed.

The plaintiff admitted upon the argument that the main object of the application was to prove by affidavit the loss of the document referred to, in order that he might use such proof upon the examination of the defendant, for the purpose of compelling him to disclose their contents. I can find no authority for such an order. The plaintiff contends that s. 242 of the Judicature Ordinance is in itself sufficient authority, but I cannot so construe it. In my view that section relates only to evidence at the trial, and does not empower me to direct proof by affidavit for any purpose other than for the trial of the action. *Ellis v. Robbins*, 50 L. J. Ch. 512, appears to bear out this construction.

The summons will therefore be discharged with costs to the defendant in any event upon final taxation.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.]

[5TH APRIL, 1895.

CAMPBELL v. HALLY.

*Assignments and preferences—Compromise by assignee—Action by creditor—
R. S. O. c. 124, s. 7.*

Where a creditor obtains an order under s.-s. 2 of s. 7 of the Assignments and Preferences Act, R. S. O. c. 124, authorizing him to bring an action in the assignee's name, the action as brought must be such as is justified by the scope of the order.

A creditor suing in the name of the assignee under this sub-section cannot attack the *bona fides* of a compromise entered into, before his action was brought, between the assignee and the defendant, when the defendant cannot be restored to his original position.

Quære, whether s.-s. 2 is not confined to cases in which an exclusive right of suing is given to the assignee by s.-s. 1.

Judgment of the Queen's Bench Division reversed;
MACLENNAN, J.A., dissenting.

Shepley, Q.C., for the appellants.

E. F. B. Johnston, Q.C., for the respondents.

COFFEY v. SCANE.

Attachment—Absconding debtor—Reasonable and probable cause.

Where a man, having numerous creditors in Ontario, leaves the province openly to reside in the United States after

publicly announcing his intention so to do, without paying his creditors, and after his departure it is found that statements made by him as to property available to pay his debts are false, and that nothing is in fact available for that purpose, his arrest upon civil process upon his return to Ontario for a temporary purpose, intending to return to the United States, is justifiable.

Judgment of the Queen's Bench Division, 25 O. R. 22, affirmed.

M. Wilson, Q.C., and E. Bell, for the appellant.

Osler, Q.C., and M. Houston, for the respondent.

HURDMAN v. CANADA ATLANTIC RAILWAY COMPANY.

Negligence—Railways—Volenti non fit injuria.

Where a railway company sent an engine and crew to the yard of a lumber company, and, under the direction of servants of the lumber company, cars of lumber were shunted from place to place by this engine and crew, the railway company were held liable in damages for the death of a servant of the lumber company, who was in a car counting lumber, caused by negligence in the management of the engine.

A finding by the jury that "the deceased voluntarily accepted the risks of shunting" was held to mean that he had accepted the ordinary risks, and not risks arising from negligence.

Judgment of the Queen's Bench Division, 25 O. R. 209, affirmed.

W. Nesbitt and H. E. Rose, for the appellants.

McCarthy, Q.C., and G. E. Kidd, for the respondent.

OLDRIGHT v. GRAND TRUNK RAILWAY COMPANY OF CANADA.

Railways—Railway station—Negligence—Damages.

A railway company is bound to provide for passengers safe means of ingress to and egress from its stations; and where a

passenger arriving at a station at night walked along a platform that was not intended to be used as a means of exit, but was not in any way guarded, and after leaving the platform fell into an excavation in the company's grounds and was injured, the company was held liable in damages.

Judgment of the Queen's Bench Division affirmed.

Osler, Q.C., for the appellants.

W. Nesbitt and *J. H. Denton*, for the respondent.

C.P.D.]

TRUMAN v. RUDOLPH.

Master and servant—Workmen's Compensation Act, 1892, 55 V. c. 30, s. 6, s.-s. 3—Master's knowledge of defect.

Where the workman is aware that the employer knows of the defect that ultimately causes the injury, he is not bound under s.-s. 3 of s. 6 of the Workmen's Compensation Act, 1892, 55 V. c. 30, to give information thereof to the employer, and his failure to give information in other cases will not bar his right of action if a reasonable excuse is shown for the omission, this being a question of fact for the jury.

Where both the employer and the workman know of the defect, and it is the workman's own duty to see that the defect is remedied, but orders given by him with that object are not carried out, he cannot recover.

Judgment of the Common Pleas Division affirmed.

N. Macdonald, for the appellant.

F. E. Hodgins and *J. S. Robertson*, for the respondent.

C. C. LINCOLN.]

ZUMSTEIN v. SHRUMM.

Action—Negligence—Damages—Highways—Turkey.

The owner of a turkey cock which, without negligence on his part, strays upon the highway, is not liable for damages

resulting from a horse taking fright at the sight of the bird and running away.

Judgment of the County Court of Lincoln affirmed.

Moss, Q.C., and *E. A. Lancaster*, for the appellants.

H. H. Collier, for the respondent.

C. C. BRANT.]

WELCH v. ELLIS.

Company—Director—Personal liability for wages—"Labourers, servants, and apprentices"—R. S. O. c. 157, s. 68.

A person employed as foreman of works, who hires and dismisses men, makes out pay-rolls, receives and pays out money for wages, and does no manual labour, and, in addition to receiving pay for his own services at the rate of \$5 a day, payable fortnightly, is paid for the use of machinery belonging to him and of horses hired by him, is not a labourer, servant, or apprentice within the meaning of s. 68 of the Joint Stock Companies Letters Patent Act, R. S. O. c. 157, and cannot recover against the directors personally.

Judgment of the County Court of Brant affirmed.

W. S. Brewster and *D. Plewes*, for the appellant.

E. Sweet and *J. T. Hewitt*, for the respondents.

BLOOMFIELD v. HELLYER.

Mortgage—Default—Emblements—Chattel mortgage.

A mortgagor after default is, as far as crops growing upon the mortgaged land are concerned, in the position of a tenant at sufferance, and cannot by giving a chattel mortgage upon the crops confer a title thereto upon the chattel mortgagee to the prejudice of the mortgagee of the land.

Judgment of the County Court of Brant reversed.

Moss, Q.C., for the appellants.

S. A. Jones, for the respondent.

C. C. HALDIMAND.]

SHERK v. EVANS.

County Court—Jurisdiction—Removal of action—54 V. c. 14—Court of Appeal—Practice—Certificate of judgment—Summary order for repayment of money.

An action cannot be removed under 54 V. c. 14 from a County Court to the High Court after a judgment in the County Court in favour of the plaintiff has been set aside for want of jurisdiction, so as to leave that judgment in force, with the right to either party to move against it in the High Court.

Re McKay v. Martin, 21 O. R. 104, considered.

Judgment of the County Court of Haldimand reversed.

Where the certificate of the judgment of the Court of Appeal, by inadvertence, directed the dismissal of a County Court action with costs, instead of merely setting aside the judgment in the County Court for want of jurisdiction, the certificate was on summary application amended and repayment of costs taxed and paid under it directed.

W. F. Walker, Q.C., for the appellants.

C. W. Colter and Kappeler, for the respondent.

C. C. WENTWORTH.]

KENNEDY v. AMERICAN EXPRESS COMPANY.

Carrier—Damages—Non-delivery of animals.

Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company.

Judgment of the County Court of Wentworth reversed.

Lynch-Staunton, for the appellant.

Bruce, Q.C., for the respondents.

C. C. MIDDLESEX.]

[5TH APRIL, 1895.]

McVICAR v. McLAUGHLIN.

Summary judgment—Default of appearance—Writ of summons—Special indorsement—Promissory note—Interest—Liquidated damages—Regularity of judgment—Nullity—Application to set aside judgment—Laches—Terms—Amendment—Costs.

By ss. 57 and 88 of the Bills of Exchange Act the interest accruing due after the date of maturity of a promissory note is recoverable by statute as liquidated damages, and is to be calculated at the rate of six per cent. per annum, in the absence of a special contract for a different rate.

And where, in an action upon two promissory notes, the plaintiff, by the indorsement on the writ of summons, claimed the principal and a definite sum for interest, without specifying the rate or the dates from which it was calculated, such sum being less than interest at six per cent. from the dates of maturity :—

Held, a good special indorsement.

London, etc., Bank v. Clancarty, [1892] 1 Q. B. 689, and *Lawrence v. Willcocks*, *ib.* 696, followed.

Ryley v. Master, *ib.* 674, and *Wilks v. Wood*, *ib.* 684, distinguished.

Held, also, that the indorsement being regular, the defendant's non-appearance was equivalent to an admission that the claim was correct, and that he was bound to pay the whole demand ; and a judgment signed for default of appearance was, therefore, regular.

Rodway v. Lucas, 10 Ex. 667, followed.

Semble, that had the indorsement lacked the essentials of a special indorsement, such a judgment would have been a nullity.

Rogers v. Hunt, 10 Ex. 474, and *Smurthwaite v. Hannay*, [1894] A. C. at p. 501, specially referred to.

Held, also, that an application to set aside the judgment, unless upon terms, was too late when made twelve days after a seizure by the sheriff under execution issued pursuant thereto, and after the defendant's wife had claimed the goods seized and an interpelader order had been made on the application of the sheriff, to the knowledge of the defendant.

Bank of Upper Canada v. Vanvochis, 2 P. R. 882; *Dunn v. Dunn*, 1 U. C. L. J. N. S. 239; and *McKenzie v. McNaughton*, 3 P. R. 85, specially referred to.

If the defendant desired to contest the whole action, it was not unreasonable that as a condition of his being allowed to do so, he should bring into Court the amount of principal claimed; but if his only objection was to the interest, the judgment might, at the option of the plaintiff, have been amended by reducing it by the amount claimed for interest, or limiting the defence accordingly.

Costs withheld from the successful respondent where the objection as to laches was substantiated by affidavits filed for the first time in the Court of Appeal.

Alexander Stuart, for the appellant.

W. E. Middleton and *A. B. Cox*, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[STREET, J., 25TH APRIL, 1895.]

In re SOLICITORS.

Solicitor—Client's moneys—Payment over—Summary order—Partnership—Misconduct—Disputed account—Striking name off roll.

Upon a summary application by a client for an order for payment over by three solicitors of moneys of hers alleged to be in their hands as a firm, and in default for an order striking them off the roll:—

Held, that no professional misconduct being suggested against two of them, one of whom had left the firm before, and the other of whom was ignorant of, the receipt of a large sum of money by the third, the summary order asked for could not be made against the two, although they might be liable in an action.

Re Toms and Moore, 3 Ch. Chamb. R. 41, and *Re McCaughey and Walsh*, 3 O. R. 425, followed.

And, it appearing that the third solicitor had a sum of money in his hands against which he had a claim for costs, an order was made for delivery and taxation of bills of costs and for an accounting, and for payment by him of the balance, if any, found due.

But, as he denied that any balance was due :—

Held, that it would be unfair to add to the order a provision that in default of payment his name should be struck off the roll. Such a term, while frequently proper, is an uncalled for slur upon a solicitor who has merely a disputed account with his client, or has been lax in rendering his bills.

Re Bridgman, 16 P. R. 232, distinguished.

G. G. Mills, for the applicant.

F. A. Anglin, for two of the solicitors.

Shepley, Q.C., for the third.

CHANCERY DIVISION.

[BOYD, C., 28TH FEBRUARY, 1895.]

ROBERTS v. DONOVAN.

Judgment—Consent—Withdrawal—Mistake—Fraud—Delay—Previous applications.

A petition for leave to withdraw a consent to judgment, and to vacate the judgment entered thereon, can be dealt with on no other grounds than any other matter of practice, although the petitioner is in custody for disobedience of such judgment.

And where a consent judgment directed that the petitioner should cause a certain mortgage to be discharged save as to the plaintiff's life estate, and the petitioner alleged that this was a mistake, and that it was intended that the mortgage should be

ordered to be discharged as to any interest which the plaintiff might have over and above a life estate, contending that the plaintiff had no such interest :—

Held, not sufficient to induce the Court to vacate the judgment and allow the case to be tried out, after the withdrawal of charges of fraud against the petitioner, the death of the original plaintiff, the lapse of more than four years since the judgment, and the prior refusal of two similar applications.

Elsas v. Williams, 54 L. J. Ch. 386, and *Peed v. Cussen*, 4 Dr. & War. 199, followed.

The defendant, *J. A. Donovan*, in person.

Moss, Q.C., for the plaintiff.

[FERGUSON, J., 22ND MARCH, 1895.]

ROBERTS v. DONOVAN.

Attachment—Imprisonment—Contempt of Court—Disobedience of judgment—Inability to obey—Discharge from custody.

The defendant, after he had been for more than three months in gaol under attachment for contempt of Court in disobedience of a judgment requiring him to cause a certain mortgage to be discharged, applied for an order for his release, upon the ground that, being destitute of money and having no means of procuring or earning it, he was unable to do what was required, and had already been sufficiently punished for his offence.

Held, that the imprisonment suffered by the defendant was not a penalty, but the remedy to which the plaintiff was entitled for execution of her judgment, and no case had been made out entitling the defendant to be discharged.

MacGregor, for the defendant *J. A. Donovan*.

Moss, Q.C., for the plaintiff.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 5TH DECEMBER, 1894.]

In re MURPHY.

Extradition—Forgery—False document—Cheque—Conspiracy to defraud—Fictitious bank account—Law of Canada—Foreign law—Amendment of warrant of commitment.

In extradition proceedings it is sufficient if the evidence discloses that the offence under the Extradition Acts is one which according to the laws of Canada would justify the committal for trial of the offender, had the offence been committed therein; it not being essential to shew that the offence was of the character charged according to the laws of the foreign country where it was alleged to have been committed; and *quære* whether evidence is admissible to show what the foreign law is.

In pursuance of a fraudulent conspiracy between the prisoner and his brother, a cheque was drawn by the brother under a fictitious name, on a bank in which an account had been opened up by the brother in such fictitious name, there being to the knowledge of the prisoner no funds to meet it, and which, on the faith of its being a genuine cheque, another bank was induced by the prisoner to cash.

Held, that the cheque was a false document both at common law and under s. 421 of the Criminal Code, 1892, and that there was sufficient evidence to justify the committal of the prisoner for extradition for uttering a forged instrument.

Regina v. Martin, 5 Q. B. D. 34, distinguished.

Where, in such proceedings, the warrant of commitment stated that the prisoner had been "committed" for the extradition offence, instead merely of his being "accused" thereof, the fact of the evidence showing that an extraditable offence has been committed will not warrant the Court in remanding the prisoner for extradition; but the Court may permit the return to be amended, and for such purpose allow it to be taken off the files and re-filed.

Aylesworth, Q.C., and *F. Fitzgerald*, for the prisoner.

Bruce, Q.C., and *Crerar*, Q.C., contra.

[BOYD, C., 15TH DECEMBER, 1894.]

SMITH v. COUNTY OF WENTWORTH.

Way—Toll roads—Toll chargeable on intersected road—R. S. O. c. 159, ss. 2, 87, 157—52 V. c. 27.

Section 87 of R. S. O. c. 159, as extended by s. 157 of that Act, and by 52 V. c. 27, applies not only to toll roads owned or held by private companies or municipal councils, but also to all toll roads purchased from the late Province of Canada; so that where one of such roads is intersected by another of them, a person travelling to the intersecting road shall not be charged for the distance travelled from such intersection to either of the termini of the intersected road, any higher rate of toll than the rate per mile charged by the company for travelling along the entire length of its road from such intersection, but subject to the production of a ticket, which he is entitled to receive from the last toll-gate on the intersecting road, as evidence of his having travelled only from such intersection.

Mandamus granted to compel the issue of such tickets.

Lynch-Staunton, for the plaintiff.

Osler, Q.C., and *McBrayne*, for the defendants.

[25TH JANUARY, 1895.]

REGINA *ex rel.* MOORE v. NAGLE.

High schools—Vacancy in board—Appointment to fill vacancy.

Where in a high school board of a high school district, constituted under s. 11 of 54 V. c. 57, and consisting of six members, three appointed by the county and three by the town, a vacancy occurred by reason of the expiration of the term of office of one of the trustees appointed by the town, the council passed a by-law appointing the relator to fill the vacancy. The council, however, at a subsequent meeting, in the absence of any of the causes provided for by the Act, namely, death, resignation, or removal from the district, etc., passed a by-law amending their previous by-law by substituting the name of the defendant for that of the relator.

Held, that the relator was duly appointed to fill the vacancy, and that he was entitled to the seat, and that the subsequent appointment of the defendant was illegal and void.

T. McVeity, for the relator.

M. J. Gorman, for the defendant.

[STREET, J., 28TH DECEMBER, 1894.]

CAPON v. CITY OF TORONTO.

Assessment and taxes—Local improvement rate—Improper charge on land—R. S. O. c. 184, ss. 612, 623—55 V. c. 48, s. 119.

Where, under a local improvement by-law, an assessment is made of the lands benefited and chargeable with the cost of the improvement, and lands having a specified street frontage are thereafter charged with a specific amount as part of the cost of the improvement, which is entered on the assessment and collectors' rolls, and such lands are subsequently sub-divided, the whole rate cannot legally be charged against a portion of the lands so sub-divided.

The duty of the clerk of the municipality is to bracket on the roll the different sub-divisions, with the names of the persons assessed for each parcel, and the annual sum charged against the original parcel as that for which the sub-divided lots and persons assessed for them are liable under the special rate.

C. R. W. Biggar, Q.C., for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

IN CHAMBERS.

[FERGUSON, J., 24TH JANUARY, 1895.]

ROBERTS v. DONOVAN.

Arrest—Order for—Writ of attachment—Contempt of Court—Disobedience of judgment—Regularity of proceedings—Imprisonment—Discharge—Conditions—Discretion—Consent judgment—Vacating—Time.

The defendant was arrested and imprisoned by a sheriff in obedience to a writ of attachment, issued pursuant to an order

of the Court, made at the instance of the plaintiff, on notice to and in the presence of the defendant, which adjudged him guilty of contempt, and ordered that the sheriff should take him into custody and commit him to the common gaol for such contempt, there to be detained and imprisoned until he should have purged his contempt, and that for this purpose a writ of attachment should issue. The writ commanded the sheriff to attach the defendant so as to have him before the Chancery Division of the High Court of Justice, there to answer touching his contempt, etc., and further to perform and abide by such order as the Court should make.

The contempt consisted in disobedience of a judgment, made upon consent, ordering the defendant to cause a certain mortgage to be discharged.

Held, upon motion for the defendant's discharge upon the return of a *habeas corpus*, that the arrest and imprisonment of the defendant under the order and writ were regular and in accordance with the proper practice; it was not necessary that the conditions of the release of the defendant from custody should be expressed in the writ.

Owing to the character of the judgment, the plaintiff was entitled to the order and writ, and they could no more be denied to her than could a remedy by way of *fi. fa.* be denied to a judgment creditor; and the matter of the defendant's continuing in confinement was not a matter resting in the discretion of any Court or Judge.

Much time having elapsed since the consent judgment and much having been done under it, it could not be vacated without consent, even if a petition to vacate it had not been already presented and dismissed.

The defendant *J. A. Donovan*, in person.

Moss, Q.C., for the plaintiff.

[16TH MARCH, 1895.]

ROBERTS v. DONOVAN.

Attachment—Imprisonment—Prisoner moving in person for discharge—Fiat to bring him before Court—Habeas corpus:

Application by the defendant for a fiat or order that he be brought before the Court for the purpose of moving in person

for his discharge from custody under a writ of attachment for disobedience of a judgment, refused.

Ford v. Nassau, 9 M. & W. 798, and *Ford v. Graham*, 10 C. B. 869, followed.

Semble, a *habeas corpus* for the purpose would be refused, and *a fortiori* a fiat or order; for the sheriff would not be bound to obey it, and if the party were removed from prison under it, he would not in the meantime be in proper and legal custody.

[FALCONBRIDGE, J., 18TH APRIL, 1895.]

HAIST v. GRAND TRUNK R. W. CO.

Trial—Stay of—Appeal from order directing new trial.

A second trial of an action was stayed pending an appeal to the Court of Appeal from the order directing such trial, where the principal question upon the appeal was as to the proper method of trial, and the appellants had been diligent in prosecuting the appeal and there was no suggestion of any possible loss of testimony.

Arnold v. Toronto Railway Co., ante p. 59, 16 P. R. 894, distinguished.

W. M. Douglas, for the plaintiff.

D. Armour, for the defendants.

[STREET, J., 26TH APRIL, 1895.]

In re FRANKLIN v. OWEN.

Prohibition—Division Court—Jurisdiction—Garnishing claim—Primary debtor abroad—Garnishees—Place of carrying on business—Cause of action—57 V. c. 23, s. 12—Promissory notes—Dividing cause of action—Separate counts.

A motion by the primary debtor for prohibition to the 8rd Division Court in the County of Elgin.

The junior Judge of the County Court of Elgin in a considered judgment, *ante* p. 105, held that the 3rd Division Court had jurisdiction in an action upon a joint and several promissory note for \$800 made by the primary debtor and her deceased husband, the primary creditor abandoning the excess over \$200. Another action was brought in the same Division Court at the same time by the same primary creditor against the same primary debtor and the same garnishees upon a promissory note for more than \$200, the primary creditor again abandoning the excess. Both notes were overdue at the time the actions were brought.

The Ancient Order of United Workmen and M. D. Carder, their Grand Recorder, were made garnishees before judgment, it being sought to attach in their hands the moneys due to the primary debtor under a beneficiary certificate upon the life of her deceased husband.

The primary debtor resided in Portland, Oregon, at the time the action was brought, and the promissory notes sued on were signed by her in one division of the city of Toronto and made payable in the other.

The actions were brought in the 3rd Division Court because the primary creditor alleged that the garnishees carried on business there within the meaning of s. 185 of the Division Courts Act, R. S. O. c. 51, and the County Court Judge, in his judgment affirming the jurisdiction, so held.

The primary debtor being resident in a foreign country, no Division Court, as was admitted, would have had jurisdiction before the Act 57 V. c. 23, s. 12, which was as follows:—
“When it is by the Division Courts Act provided that a claim may be entered, or an action brought, or that any person or persons may be sued in any Division Court, such action may be brought, notwithstanding that the residence of the defendant is, at the time of bringing the action, out of the Province of Ontario, and such action may be brought in the Division Court in which the cause of action arose,” (*sic*) “and continued to completion in as full and effectual a manner as might have been the case if the defendant resided in the Province.”

The primary debtor sought to prohibit further proceedings in the two actions, upon the following grounds: (1) that a Division Court had no jurisdiction over her, she residing in a

foreign country; (2) that even if she was amenable to the jurisdiction of a Division Court, this action was brought in the wrong Court, and there was no Court which would have jurisdiction, as the cause of action did not arise wholly within any one division; (8) that by bringing two separate actions, the primary creditor had divided a cause of action, contrary to s. 77 of the Division Courts Act, R. S. O. c. 51.

Swabey, for the primary debtor.

Kilmer, for the primary creditor.

Totten, Q.C., for the garnishees.

STREET, J. :—As to the 8rd ground urged, it is plain that in an action at law the two promissory notes would have been declared upon in two separate counts; and therefore, applying the cases of *Re Clark v. Barber*, 26 O. R. 47, and *Re Ball v. Bell*, *ib.* 128, there was no dividing of a single cause of action.

As to the other grounds of the motion, it seems to me that s. 12 of 57 V. c. 28 gives jurisdiction, in a case where the defendants reside out of the province, only to the Division Court of the division in which the cause of action arose. To construe that section as it was construed by the learned Judge in the Division Court, and as it is now contended by the primary creditor it should be construed, would introduce anomalies not intended to be introduced. If that contention is correct, the words "and such action may be brought in the Division Court in which the cause of action arose" are quite unnecessary. The enactment was not intended to apply to a garnishing plaint at all, or else it is not to be construed in the manner contended for by the primary creditor.

Order for prohibition with costs.

[MEREDITH, J., 20TH APRIL, 1895.]

GENERAL ELECTRIC CO. v. VICTORIA ELECTRIC
LIGHT CO. OF LINDSAY.

Pleading—Cross-counterclaim—Striking out—Rules 371-383.

A person brought into an action as defendant to a counterclaim delivered by the original defendant cannot deliver a counterclaim against such defendant.

Such a pleading, not being authorized by the Rules or the practice, was struck out on summary application.

Construction of Rules 371-388.

Street v. Gover, 2 Q. B. D. 498, followed.

Green v. Thornton, 9 Occ. N. 139, distinguished.

C. Millar, for the original defendants.

J. A. Paterson, for the Canadian General Electric Co., defendants by counterclaim.

In the Seventh Division Court in the County of Essex.

[McHUGH, JUN. J., 19TH MARCH, 1895.]

DETROIT SOAP CO. v. THATCHER.

Division Court—After-judgment summons—Division Courts Act, R. S. O. c. 51, s. 235—"Carries on his business."

Judgments having been recovered against the defendant in the above and two other actions, after-judgment summonses were issued, on the return of which objection was taken by the defendant as set out below.

Rodd, A. R. Bartlet, and Sale, for the several plaintiffs.

J. P. Carr, for the defendant.

McHUGH, JUN. J.:—The defendant in these actions is the consular agent of the Government of the United States at Windsor. He resides in the city of Detroit, but comes daily to Windsor to perform his consular duties. The plaintiff corporation is organized under the laws of the state of Michigan, and the other plaintiffs are American citizens. Prior to the entry of these actions the plaintiffs had recovered judgments for the same claims in the city of Detroit. Judgments were entered in this Court by default. I have already held that the defendant's official position in no way exempts him from examination under the provisions of s. 235 of the Division Courts Act. He takes the further objection that he is not subject to examination as a judgment debtor within the meaning of that section, for the reason that he does not reside or carry

on his business within the county of Essex. The phrase "carries on his business" does not appear to have been construed by our Courts, but similar statutory provisions have been considered by the English Courts. I refer to *Lewis v. Graham*, 20 Q. B. D. 780, affirmed on appeal in 22 Q. B. D. 1. The Court decided in that action that the words "carry on business" applied to the carrying on of business by the person who is the owner or part owner, and not to a clerk or servant of such owner. A different construction was placed upon similar words in *Ex p. Breull*, 16 Ch. D. 484, where it was held that a wider and more extended meaning could be given to these words to enable the Court to give effect to the object and intent of the enactment in question. I think I should follow *Lewis v. Graham*, and the authorities approved of in that case. There is nothing to indicate that the words "carries on his business" in s. 235 should be given a wider meaning than they ordinarily convey. Section 81 of the Division Courts Act, which makes provision for the divisions in which actions may be entered and tried, employs the phrase "in which the defendant resides or carries on business," whereas the more definite words "his business" occur in s. 235. It has been held in England that a clerk in the Admiralty, a clerk in the Privy Council, and a solicitor's clerk do not "carry on business" within the meaning of statutory enactments similar to the one under consideration. So far as the application of these words is concerned, the defendant's employment cannot well be distinguished from that of a clerk or servant. He is the agent of a foreign government, and holds office during the pleasure of his employer. It is the business of the government and not his own he performs. I think he cannot be said to "carry on his business" in the county of Essex within the meaning of s. 235.

The defendant has not waived his right to object to the jurisdiction of the Court; and I am also of opinion that the statutory provision enabling plaintiffs to sue foreigners does not aid the plaintiffs in this proceeding. All the parties to these actions are foreigners, and the plaintiffs appear to have invoked the aid of this Court to enforce their claims against the defendant by a remedy which is not available to them under the laws of Michigan.

The summonses will be dismissed without costs.

NOVA SCOTIA.

In the Supreme Court.

[2ND APRIL, 1895.]

REGINA v. ROBERTS.

Execution—Costs of quashing conviction under Canada Temperance Act—Criminal proceeding—Form of execution—Arrest—Crown Rules, 1889—Nova Scotia Act abolishing imprisonment for debt—British North America Act.

A summary conviction of the defendant by a stipendiary magistrate for the county of Pictou, for an offence against the Canada Temperance Act, having been removed into this Court by *certiorari*, was quashed with costs to be paid by the informant to the defendant: 14 Occ. N. 481.

The practice in *certiorari* in Nova Scotia is regulated by the Crown Rules passed on the 10th September, 1889, by the Judges of this Court, under the joint authority of 52 V. c. 40 (D.), an Act respecting Rules of Court in relation to criminal matters, and R. S. N. S., 5th series, c. 104, the Nova Scotia Judicature Act, 1884, and amending Acts.

The Rules are substantially the same as the English Crown Rules, and, as they were intended to regulate the procedure in both civil and criminal matters on the Crown side, it was necessary, having regard to s. 91, s.-s. 27, and s. 92, s.-s. 14, of the British North America Act, that in passing them the Judges should have the joint authority of the Parliament of Canada and the Legislature of Nova Scotia.

By Rule 129, the Rules following it are to apply to all criminal proceedings on the Crown side.

Rule 136—"Every person to whom any sum of money or any costs shall be payable under a judgment shall, immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of execution to enforce

payment thereof, in the form used by this Court in civil proceedings, or as near thereto as practicable."

Rule 137—"Every order of the Court or a Judge in any cause or matter may be enforced in the same manner as a judgment to that effect."

Rule 140—"Writs of execution shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed in civil proceedings."

The form of execution "used by this Court in civil proceedings" on the 10th September, 1889, the date of the passing of the Rules, contained a clause directing the sheriff to take the body of the debtor in default of payment or of goods and chattels of the debtor wherewith to satisfy the amount due under the execution.

On the 1st May, 1891, an Act of the Legislature of Nova Scotia abolishing imprisonment for debt came into force, and on the 2nd May, 1891, the Judges of this Court met under the sole authority of the Judicature Act, 1884, and amending Acts, and amended the form of execution then in use by striking out the clause directing the sheriff "to take the body of the debtor." This amendment was made as a matter of necessity under the Act abolishing imprisonment for debt.

For the costs awarded by the order quashing the conviction in this case, execution was issued in the old form, containing the clause directing the sheriff to "take the body," etc.

The proceedings leading to the issue of the execution were taken and completed in the year 1894.

The informant moved to set aside the execution issued as irregular, upon the ground that it was not in the form used by this Court in civil proceedings.

The motion was at first heard before RITCHIE, J., who referred it for re-hearing and decision to the full Court.

It was accordingly re-argued before WEATHERBE, RITCHIE, and MEAGHER, JJ., and GRAHAM, E.J.

E. M. McDonald, for the informant. The words in Rule 136 "in the form used by this Court in civil proceedings" means the form in use at the time of the recovery of the judgment or order. No form of execution is given in the Crown Rules, but the form given in the Judicature Act and amendments, being

"the form used in this Court in civil proceedings," was incorporated in the Crown Rules by reference, and, as the form of execution was amended prior to the proceedings in this case, and the execution in question contained the clause which had been struck out by such amendment, it was not in the form required by the Rule.

John J. Power, for the defendant. Under the British North America Act a Provincial Legislature has no power to regulate criminal procedure. It would be *ultra vires* of the Nova Scotia Legislature to legislate in regard to execution for costs in criminal proceedings. The provisions of the Act abolishing imprisonment for debt did not and could not apply to costs payable under an order quashing a conviction for an offence against the Canada Temperance Act. When the Judges amended the form of execution, they met under the sole authority of the Legislature of Nova Scotia, and not under the joint authority under which they met and passed the Crown Rules in the first instance. The amendment could not, therefore, be considered an amendment of the Crown Rules in respect to any criminal proceeding on the Crown side. The true construction to be placed upon Rule 136 is that the words "in the form used by this Court in civil proceedings" means the form in use on the 10th September, 1889, the date on which the Rules were passed.

RITCHIE, J., delivered the judgment of the Court, dismissing the motion and holding the execution to be regular. The words "in the form used by this Court in civil proceedings" were to be construed as meaning the form in use on the 10th September, 1889, and not such form as might be in use from time to time. The proceeding in question, being a criminal proceeding, was unaffected by the Nova Scotia Act abolishing imprisonment for debt, and the Crown Rules could only be amended by the Judges under the joint authority necessary in that behalf. The form "in use in this Court in civil proceedings" on the 10th September, 1889, was the form the Judges had in mind when passing the Crown Rules, and was incorporated therein by reference, and no amendment having since been made to the Crown Rules in respect thereof, the execution, having followed that form, must be sustained.

(Reported by *J. Harris Vickery, Esquire.*)

MANITOBA.

—
In the Queen's Bench.

[DUBUC, J., 15TH APRIL, 1895.]

IMPERIAL BANK v. GLINES.

Appeal—Irregularity—Waiver of.

The plaintiffs filed their declaration more than one year after the writ of summons had been served. The defendants obtained a summons to set aside the declaration, which was discharged by the referee, whereupon they appealed to a Judge.

The order appealed from showed that, upon their own application before the referee, the defendants were granted eight days' further time to plead to the declaration. It was contended on behalf of the plaintiffs that a declaration filed more than one year after the service of the writ of summons was an irregularity only, and that the defendants by applying for an extension of time to plead had waived the irregularity.

Held, that the right of appeal which the defendants might have had, had been waived, and the referee having exercised his discretion in dismissing the summons, his order should be affirmed with costs in the cause to the plaintiffs in any event.

Culver, Q.C., for the plaintiffs.

McMeans, for the defendants.

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[KILLAM, J., 17TH APRIL, 1895.]

GREY v. MANITOBA AND NORTH-WESTERN R. W. CO.

Railways—Mortgagees—Sale—Receiver—Part of line out of jurisdiction—Remedy.

The plaintiffs, as mortgagees, in trust for bondholders, of the

defendants' railway, and of its tolls and revenues, brought this suit for a sale of the property and, in the meantime, for a receiver.

The defendant company, by the mortgage on which the plaintiffs sued, conveyed to the plaintiffs 180 miles of the railway, under the description of the first division.

By the answer objection was taken to the non-joinder as parties of the bondholders, for whose benefit the mortgage was made.

Held, that a mortgagee-trustee can sue by himself without joining the *cestuis que trustent*.

Fraser v. Sutherland, 2 Gr. 442, followed.

An objection to a decree for sale was raised by evidence showing that Langenburg, the terminal point of the mortgaged division, and the last nine and one-half miles of that division, were situated in the North-West Territories, and not within the territorial jurisdiction of this Court.

Held, that the defendant company was not precluded from raising, without pleading it, the objection that a portion of the mortgaged property was beyond the territorial jurisdiction of the Court. It would not have been a case for a technical plea to the jurisdiction.

The onus was upon the plaintiffs, where a portion of the mortgaged property might, or might not, be situated within Manitoba, to show that all of it was so, if this Court could not exercise jurisdiction in respect of the portion without the Province.

The Court of Chancery in England has, from a very early date, entertained suits of various kinds relating to real property situated in other countries, and there can be no doubt of the jurisdiction of this Court to do so in many cases.

Henderson v. Bank of Hamilton, 28 S. C. R. 719; *Norris v. Chambres*, 29 Beav. 246, specially referred to.

The Court of Chancery in England will decree foreclosure of a mortgage of lands abroad, where the mortgage was made in England and the mortgagor resided there: *Paget v. Ede*, L. R. 18 Eq. 118.

The jurisdiction of this Court to decree a sale under a mortgage of lands within the Province is unquestionable. The only difficulty in the present case was in the nature of the property. The portion of the railway within Manitoba, or any portion less than the whole mortgaged division, could not be considered to be a "section" within the meaning of s. 278 of the Railway Act, and could not, therefore, be sold separately. But the jurisdiction to administer the portion of an estate within the country of the *forum* may draw with it jurisdiction to administer also the portion situated abroad.

In re Orr-Ewing, 22 Ch. D. 426, followed.

As to the appointment of a receiver, the fact of a portion of the mortgaged property being without Manitoba can be no bar: *Houlditch v. Marquess of Donegal*, 2 Cl. & F. 470; *Bunbury v. Bunbury*, 1 Beav. 818.

Decree made continuing the receiver, and directing the usual inquiries as in an ordinary suit for sale under a mortgage, showing, however, that the conditions of the power of sale contained in the mortgage deed were to be complied with before sale.

Ewart, Q.C., and *Wilson*, for the plaintiffs.

Tupper, Q.C., and *Phippen*, for the defendants.

[BAIN, J., 15TH APRIL, 1895.]

GRUNDY v. GRUNDY.

Pleading—Replication—Embarrassment—Promissory notes—Partnership.

Application by way of appeal from an order of the referee striking out the plaintiffs' third replication as embarrassing. To an action on two promissory notes made by the defendant to the plaintiffs, the defendant pleaded by way of counterclaim that the plaintiffs and defendant were co-partners, and, on the dissolution of the partnership, the plaintiffs covenanted to pay the liabilities of the firm to the Commercial Bank of Manitoba, and had failed to pay the same, and the bank held the defendant

liable and had threatened to sue him for the same; and that by the liability standing against him the credit of the defendant had been unfavourably affected, and he had suffered much damage.

By their third replication the plaintiffs stated that at the time of the partnership the liability of the firm to the Commercial Bank was \$26,615, which sum had since been reduced by the plaintiffs to \$8,600, for the payment of which the bank was amply secured by a large number of collateral notes, the property of the plaintiffs; that the balance due would be paid in a short time, and the bank had not called upon the defendant to pay the debt and had not threatened to sue or harass the defendant upon the debt.

Held, that the replication was a good answer to the defendant's plea.

Appeal allowed and the order striking out the replication set aside; costs to be costs in the cause to the plaintiffs in any event.

Howell, Q.C., and Metcalfe, for the plaintiffs.

Mathers, for the defendant.

[16TH APRIL, 1895.]

FROST v. DRIVER.

Real Property Act—Registered judgment—Binding exemption.

In August, 1893, the petitioners, having recovered a judgment in the Court of the Queen's Bench against the respondent Driver, caused a certificate of the judgment to be recorded in the Land Titles Office at Brandon. In May, 1894, Driver made application to the District Registrar to have the land in question brought under the Real Property Act, and for a certificate of title therefor, free and clear from the above judgment, and he directed that the certificate of title should issue to the respondent Dickson. The petitioners thereupon filed a caveat, and in their petition thereunder they asked that it might be declared that their judgment bound and formed a

lien and charge on the lands in question and that Dickson was not entitled to a certificate of title except as subject to the judgment.

It was admitted that, at the time Driver made the application to the District Registrar, he was the owner and was residing on the lands and was cultivating them wholly or in part, and that he was entitled to all the exemptions mentioned in the Acts in the Revised Statutes of Manitoba respecting executions and judgments respectively.

Held, that the contention of the petitioners was correct, that their judgment was a lien and charge on these lands, and that the certificate must be issued subject to the judgment, as a lien or charge. The statutes showed a definite intention on the part of the Legislature that the registered judgment shall charge all the lands of the judgment debtor in the district in which it is registered, though the right to enforce the charge or lien remains in abeyance and cannot be enforced against such of his lands as come within the description of lands that are "exemptions" under s. 12 of the Judgments Act.

The petitioners were entitled to an order according to the prayer of their petition, and they were also entitled to the costs incidental to the filing of the caveat and of the proceedings in Court.

Martin, for the petitioners.

Clark, for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

CH. D.]

[14TH MAY, 1895.]

CRAWFORD v. BRODDY.

Will—Construction—Inconsistent clauses.

A testator by the third clause of his will, made in numbered clauses, devised a lot to his son F., and after having by the fourth clause appointed executors, he, by the fifth clause, devised another lot to these executors to be disposed of by them for the benefit of named sons and daughters in certain shares and amounts. In this clause there was the following paragraph: "At the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors."

Held, reversing the judgment of the Chancery Division, 25 O. R. 685, STREET, J., dissenting that this paragraph did not apply to or modify the devise to F. in the third clause.

T. J. Blain, for the appellants.

J. C. Hamilton and *T. Dixon*, for the respondents.

W. H. McFadden, for the executors.

C.P.D.]

CANADIAN PACIFIC R. W. COMPANY v. TOWNSHIP OF CHATHAM.

Municipal corporations—Drainage—Contract—Ultra vires—By-law—R. S. O. c. 184, ss. 569, 573, 585.

Where drainage works for the benefit of lands in two townships prove, as originally initiated and constructed,

insufficient, an addition thereto costing more than \$200 must be authorized by petition and by-law under the Act, and a contract entered into under seal by one township binding itself to pay the cost of the additional work cannot, even after completion and acceptance of the work, be enforced.

Judgment of the Common Pleas Division, 25 O. R. 465, affirmed; OSLER, J.A., dissenting.

Moss, Q.C., and *Angus MacMurchy*, for the appellants.

M. Wilson, Q.C., and *Pegley*, Q.C., for the respondents.

GORDON v. DENISON.

Trespass—Police magistrate—Jurisdiction—Warrant to compel attendance of witness—R. S. C. c. 174, s. 62—Malicious arrest—Imprisonment—Damages.

Where a police magistrate acting within his jurisdiction under R. S. C. c. 174, s. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpoena, he is not liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest.

Judgment of the Common Pleas Division, 24 O. R. 576, affirmed.

Osler, Q.C., and *H. S. Osler*, for the appellant.

Delamere, Q.C., and *Macklem*, for the respondent.

In an action for malicious arrest, judgment cannot be entered upon answers to questions submitted to the jury; a general verdict must be given.

Judgment of the Common Pleas Division, 24 O. R. 576, reversed; MACLENNAN, J.A., dissenting.

H. M. Mouat, for the appellant.

Osler, Q.C., and *H. S. Osler*, for the respondent.

Boyd, C.]

FITZGERALD v. CITY OF OTTAWA.

Municipal corporations—Drainage—New territory—Old drain.

Where a municipality makes alterations in, and thus adopts as part of its own drainage system, a drain existing in territory

acquired from another municipality, it is liable for damages caused by subsequent neglect to keep the drain in repair.

Judgment of BOYD, C., 25 O. R. 658, affirmed; MACLENNAN, J. A., dissenting.

Moss, Q. C., and *MacTavish*, Q. C., for the appellants.

Wyld, for the respondent.

MACMAHON, J.]

SWEENY v. TOWN OF SMITH'S FALLS.

Municipal corporations—Local improvements—Debentures—By-law—Registration—R. S. O. c. 184, ss. 351, 352.

Even after registration under s. 352 of the Municipal Act, R. S. O. c. 184, of a local improvement by-law, a ratepayer may show that the by-law is invalid, and successfully resist payment of the local improvement tax.

Judgment of MACMAHON, J., reversed.

Osler, Q. C., for the appellant.

Moss, Q. C., and *Lavell*, for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 28TH FEBRUARY, 1895.]

COPE v. COPE.

Dower—Right to writ of assignment of—R. S. O. c. 55, s. 7—Judgment in former action—"Subject to dower."

Held, in an action for dower, that the judgment or decree in an action to establish a will, by which it was declared that the plaintiff therein was entitled to the land in question in fee

simple "subject to the dower of the defendant R. C.," was not such a judgment as entitled the dowress to sue out a writ of assignment of dower under R. S. O. c. 55, s. 7; and consequently did not prevent the Statute of Limitations from running.

Judgment of ROSE, J., reversed.

E. D. Armour, Q.C., for the defendants.

J. G. Farmer, for the plaintiff.

[22ND MAY, 1895.]

BRABANT v. LALONDE.

Will—Construction—"Nearest of kin"—Period of ascertainment—Tenants in common—"Then"—Owner—Election.

Judgment of STREET, J., *ante*, p. 134, affirmed on appeal to a Divisional Court composed of ROSE and FALCONBRIDGE, JJ.

Shepley, Q.C., for the appellants, the defendants J. B. and O. Lalonde.

J. B. O'Brian, for the plaintiff.

[23RD MAY, 1895.]

HALLIDAY v. TOWNSHIP OF STANLEY.

Venue—Change of—Convenience—Appeal—New material—Change of circumstances.

The plaintiff's right to select a place of trial is not lightly to be interfered with, where it has not been vexatiously chosen.

And where the defendants in moving to change the venue to the county where the cause of action arose did not show a considerable prepondance of convenience in favour of the change, their application was refused; and the refusal was affirmed on appeal to a Divisional Court composed of FALCONBRIDGE and MACMAHON, JJ.

Held, also, that the appeal must be dealt with on the facts as they were exhibited before the Master and Judge in Chambers, although since their orders the trial had been postponed from the spring to the autumn, and the Court ought not to look at new material nor listen to suggestions of possible changes, unless, in a proper case, to allow a new substantive application to be made.

L. G. McCarthy, for the plaintiff.

Garrow, Q.C., and *D. Armour*, for the defendants.

[MEREDITH, C.J., 1ST MAY, 1895.]

THE MINISTER OF EDUCATION, APPELLANT.

TRUSTEES OF SCHOOL SECTION No. 16, HARWICH, v.
TRUSTEES OF SCHOOL SECTION No. 10, HARWICH.

Public Schools Act—Alteration of section—Division of property—Award—Jurisdiction—Appeal from Division Court.

School section number 10 of the township of Harwich was divided into two sections by by-law of the township, followed by an award made on the 27th day of August, 1887, defining the boundaries. The detached portion of the section was made a new school section by the name of school section number 16. The school house was in the remaining part of school section 10. Thereafter the trustees of the two sections met for the purpose of dividing the property, and a sum of ready money in the bank to the credit of the original section 10 was proportionately divided. No other property was in fact divided. The school house was repaired by the trustees of the new section 10, and used by them with the furniture until 1898, when they sold it. The trustees of section 16 then claimed a proportion of the purchase money, and the demand not being acceded to, the township council, by by-law, appointed arbitrators to decide upon the matters in question pursuant to the Public Schools Act, 54 V. c. 55, s. 88. The arbitrators, with the inspector, heard the matter, and made an award in favour of the plaintiffs, awarding them half of the proceeds of the sale of

the school house, and part of the costs of the award. An action was brought in the 1st Division Court in the county of Kent on the award. The defendants alleged that the arbitrators had no authority to determine, as they did, that they had jurisdiction on account of want of agreement between the parties as to the division of property; that the award was bad on its face; and that an agreement had in fact been arrived at whereby the defendants were to keep the school house. The plaintiffs alleged that no agreement was arrived at, save that the school house was to have been used by the defendants till sold, and then the proceeds divided equally. The learned Judge held that no agreement had been arrived at, and gave judgment for the plaintiffs for a proportionate part of the purchase moneys.

The Minister of Education appealed under s. 180 of the Act.

Armour, Q.C., for the plaintiffs, objected that an appeal would not lie, as the action was not an action given by the Act, but was an action brought in the Division Court only because of the amount. The award was final under s. 88, and the Act did not give any further remedy or proceeding, but left the parties to their common law action. Section 179 gives an appeal only where the parties are suing in the Division Court under special jurisdiction given by the Act, such as by s. 138.

Objection overruled.

Aylesworth, Q.C., for the appellant, contended that there was no jurisdiction to make the award, because an agreement had been arrived at to make a partial division of the property, and a partial division had in fact been made when the ready money was divided. Section 88 allows an award to be made only when no agreement is arrived at, and then only with respect to "all rights and claims consequent upon" the division of the school section. Here an award was made only of part of the property. He also contended that the claim was barred by laches, as it compelled the ratepayers of 1895 to pay a claim of 1887.

Armour contended that it could not be assumed that the arbitrators were not influenced in their award by the fact of the partial division. It appeared in evidence, and might have been considered by the arbitrators. It was within their jurisdiction to consider it and readjust it if they thought fit, as they had power to adjust everything, and could have taken this payment

into account on making the award. The fact that they did not readjust it does not prove that they did not consider it. In order to oust the jurisdiction of the arbitrators it must be shown that the payment was taken in satisfaction of all rights and demands.

Held, that the payment could be treated only as a payment on account, and that no final agreement was arrived at, and therefore that the arbitrators had jurisdiction.

Held, also, that as the award was final and conclusive, the Court would not go into the evidence to ascertain whether the property had been properly adjusted.

Held, also, that the time which had elapsed was no bar to the award or action thereon, there being no bar fixed by this statute; but the Court was of opinion that the Legislature should fix a time, as the delay tended to cast on the ratepayers of a future year the burden of a prior one.

Appeal dismissed with costs.

[STREET, J., 18TH APRIL, 1895.]

In re HODGINS AND CITY OF TORONTO.

Municipal corporations—Construction of sidewalk—“Desirable in the public interest”—Consolidated Municipal Act, 1892, s. 623b.

Held, that to consider and determine whether a sidewalk is desirable in the public interest within the meaning of s. 623 b. of the Consolidated Municipal Act, 1892, is a judicial act, and before a municipal corporation reach a conclusion upon the point, the persons to be affected should have notice and be permitted to show, if they can, that the proposed sidewalk is not desirable in the public interest; and where such notice had not been given except by advertisement in a newspaper, which had not come to the attention of the applicant, who had been called upon to pay the assessment for such sidewalk, the by-law for the construction of it was quashed so far as it purported to affect the property of the applicant.

The applicant in person.

Caswell, for the corporation of the city of Toronto.

CHANCERY DIVISION.

[THE JUSTICES IN BANC, 1ST MARCH, 1895.]

REGINA v. GILES.

Betting—Keeping place therefor—Criminal Code, ss. 197, 198.

The defendant was in possession of and occupied a tent in a village open to and frequented by the public to the number of 50 to 100 per day, in which there was a telegraph wire to an incorporated race track in the United States, where horse-racing and betting was legalized, and in which there was a blackboard on which were the names of the horses, jockeys, etc., taking part in the race, with the track quotations; and, as the race was being run, an operator called off the progress thereof, giving the name of the winner, and of the second and third horses, and marked them on the board. Duplicate tickets were furnished to applicants at a wicket in the tent, which tickets requested the defendant to telegraph B. at the race track to place a certain amount of money on a horse named by an applicant at track quotations, and upon transmission thereof agreed to pay defendant 10 cents, and that all liability on his part should cease, etc. On the tickets being handed in, one of them was stamped with the date of its receipt and returned to the applicant. The money so received was transmitted to B. and placed by him with book-makers on the track, B. paying the defendant a percentage on the moneys received for him and ten cents on each application. B. had an agent in another part of the village, whom he furnished with money to pay any winnings by remitting the same to him, or giving him orders on the defendant for stated sums.

Held, that the defendant was properly convicted under ss. 197 and 198 of the Code, of keeping a common betting house.

J. R. Cartwright, Q.C., for the Crown.

Osler, Q.C., *Aylesworth*, Q.C., and *W. G. Murdoch*, for the defendant.

[THE DIVISIONAL COURT, 27TH MAY, 1895.]

In re GRANT.

Life insurance—R. S. O. c. 136, s. 6 (1)—51 V. c. 22, s. 3—53 V. c. 39, s. 9—58 V. c. 34, s. 12—Wives and children—Policy—Will—Variance—Apportionment—Infants—Fund in Court—Executors.

The executors of George R. Grant appealed from the order of ARMOUR, C.J., in Chambers, of the 12th February, 1895, *ante* p. 102, 26 O. R. 120, dismissing with costs their application for payment out of Court to them of \$2,000 paid in by a benefit society.

The appeal was heard by a Divisional Court composed of BOYD, C., and MEREDITH, J.

J. J. Warren, for the executors, contended that the decision appealed against was wrong upon the construction of s. 6 (1) of R. S. O. c. 86, as amended by 51 V. c. 22, s. 3, and 53 V. c. 39, s. 6, and in conflict with *McKibbon v. Feegan*, 21 A. R. 87; *Re Lynn, Lynn v. Toronto General Trusts Co.*, 20 O. R. 475; and *Beam v. Beam*, 24 O. R. 189.

H. Cassels, for the widow, stated that she did not seek payment to her of the moneys in Court, but asked that they should be retained there and administered for the benefit of the children, who were infants.

F. W. Harcourt, for the infants, contended that as the moneys had been paid into Court and the widow was willing that the infants should have the benefit of them, they should, under no circumstances, be paid out to the executors.

THE COURT pointed out the amendment made to R. S. O. c. 136, s. 6 (1), by the Legislature of Ontario at its last session, 58 V. c. 34, s. 12, adding the following words: "And whatever the insured may under this section do by an instrument in writing attached to or indorsed on or identifying the policy, or a particular policy or policies, by number or otherwise, he may also do by a will identifying the policy or a particular policy or policies by number or otherwise. . . ." This amendment became law on the 16th April, 1895, since the decision now in appeal. It would serve no good purpose for the Court now to consider whether the decision was right upon the statute as it stood before the amendment.

Warren contended that the order below was wrong in principle and should be reversed because by it the executors were ordered to pay costs personally.

THE COURT declined to pass upon the question of law raised merely for the purpose of deciding how the costs should be borne, as the amendment would cover any future case which might arise.

BOYD, C., was of opinion, in view of the amendment and the attitude of the widow, that it would be just to order that there should be no costs to the executors here or below.

MEREDITH, J., was of opinion that the executors should pay the costs here and below.

As the result of this division of opinion, an order was made dismissing the appeal without costs; the infants to have their costs out of the fund in Court. Leave to appeal was refused.

[BOYD, C., 5TH APRIL, 1895.]

McSLOY v. SMITH.

Animals—Cattle straying from one enclosure into another—Running at large—Act respecting pounds—Pound-keeper—R. S. O. c. 195.

The effect of ss. 2, 8, 6, 20, and 21 of the Act respecting pounds, R. S. O. c. 195, is to give a right to impound cattle trespassing and doing damage, but with a condition that if it be found that the fence broken is not a lawful fence, then no damages can be obtained by the impounder, whatever may be done in an action of trespass.

Cattle feeding in the owner's enclosure or shut up in his stables cannot be held to be running at large within the meaning of the usage and the law, when they may happen to escape from such stable or enclosure into the neighbouring grounds.

DuVernet and *W. E. Kelly*, for the plaintiff.

Ball, Q.C., for the defendant.

[29TH APRIL, 1895.]

LANCEFIELD v. ANGLO-CANADIAN PUBLISHING CO.

Copyright—Penalty—Printing Canadian copyright work abroad—Impressing thereon fact of Canadian copyright—R. S. C. c. 62, s. 33.

There is nothing in s. 33 of the Copyright Act, R. S. C. c. 62, to prevent the owner of a Canadian copyright in respect to a musical composition having the work printed abroad, and inserting thereon the existence of such copyright before publishing the work in Canada.

It is not expressly declared in the Act that the continuance of the privilege of copyright depends on the printing, as well as the publication, of the composition in Canada.

That may be inferred from certain provisions in the Act, and it may be that such importations as these are not protected by the Act; but these matters were not raised in this case, which had to do simply with the penalty clause, s. 33.

Lynch-Staunton, for the plaintiff.

J. Bicknell and *H. D. Hulme*, for the defendants.

[ARMOUR, C.J., 8TH JANUARY, 1895.]

McPHERSON v. IRVINE.

Courts—Jurisdiction—Revocation of letters of administration.

No jurisdiction exists in, or has ever been conferred upon, the High Court of Justice to revoke the grant by a Surrogate Court of letters of administration.

Irving, Q.C., and *D. W. Saunders*, for the plaintiff.

S. H. Blake, Q.C., and *DuVernet*, for the defendant.

[MEREDITH, C.J., 1ST APRIL, 1895.]

TREVELYAN v. MYERS.

Foreign judgment—Merger—Right to sue on original cause of action.

The recovery of a foreign judgment upon a covenant is not a merger of the covenant or the right to sue thereon, and the

covenantee may, notwithstanding the recovery of the foreign judgment, sue upon and recover judgment upon the covenant in an Ontario Court.

Walter Cassels, Q.C., and W. H. Lockhart Gordon, for the plaintiffs.

Monro Grier and Orville M. Arnold, for the defendant.

[9TH APRIL, 1895.]

JANES v. O'KEEFE.

Landlord and tenant—Covenant to pay taxes—Construction—Right of building over lane—Interest in land.

A lessee of property in Toronto covenanted to pay all taxes "to be charged upon the said demised premises or upon the lessor on account thereof." The premises consisted of a building property on Yonge street, which had in the rear a lane, over which the lease provided that the lessee might at any time erect a building or extension, provided the same was always nine feet above the ground. The lease contained a covenant for renewal, with a proviso that if the lessors elected not to renew it they were to pay a fair valuation for the buildings, which should at that time be erected, "on the lands and premises hereby demised and over the said lane."

Held, that on the proper construction of the above lease, the words "demised premises" in the covenant as to paying taxes must be referred only to the building lot itself, and not to the interest in the lane which passed by the lease.

Semble, where a tenant agrees to pay taxes on the land demised to him, the omission of the assessor to enter his name on the assessment roll, or that of the landlord to resort to the Court of Revision to have the omission rectified, would not be any answer to the claim of the latter that the tenant should indemnify him against payment of the taxes.

Held, also, that the interest of the defendants in the lane under the above lease was clearly an interest in the land.

E. F. B. Johnston, Q.C., and N. F. Davidson, for the plaintiff.

Moss, Q.C., and W. H. Lockhart Gordon, for the defendants.

[4TH MAY, 1895.]

ROBERTS v. DONOVAN.

Attachment—Contempt of Court—Discharge—58 V. c. 13, s. 29—Terms.

After the enactment of s. 29 of 58 V. c. 13, which was assented to on the 16th April, 1895, and after the defendant had been nearly five months in gaol under an attachment issued pursuant to an order committing him for contempt of Court in disobedience of a judgment requiring him to cause a certain mortgage to be discharged, an order was made for his release upon the terms of his consenting to a judgment against him for the sum required to pay off the mortgage and all costs for which he was liable to the plaintiff, and upon his undertaking not to bring any action against any one on account of his arrest and imprisonment, such order to be without prejudice to any proceeding or the right of the plaintiff against any other person.

J. W. McCullough, for the defendant *J. A. Donovan*.

Moss, Q.C., for the plaintiff.

[OSLER, J.A., 21ST APRIL, 1895.]

In re FLETCHER'S ESTATE.

Executors and administrators—Devolution of estates—Sale of infants' lands—R. S. O. c. 108, s. 8, s.-s. 1—54 V. c. 18, s. 2.

The effect of 54 V. c. 18, s. 2, is to vest in executors and administrators, whether there are infants or not, the absolute discretion to sell the real estate for the purpose of paying the debts; and whether there are debts or not, for the purpose of the distribution of the estate among the persons beneficially entitled; provided that where infants are entitled or where other heirs or devisees do not concur in the sale, and there are no debts, no such sale shall be valid as respects such infants or other heirs or devisees unless the sale is made with the approval of the official guardian. This amounts to an amendment of s. 8, s.-s. 1, of the Devolution of Estates Act, R. S. O. c. 108, the approval of the official guardian being now required only in

the case of a sale for the purpose of distribution simply, i.e., where there are no debts, and where there also happen to be infants or non-concurring heirs or devisees.

Where, therefore, administrators, in contracting to sell lands in which infants were interested, under circumstances not requiring the consent of the official guardian under the above first mentioned enactment, nevertheless made the contract of sale subject to such approval being obtained, and, it was alleged, lost the sale by having through negligence and delay failed to obtain the official guardian's approval within the time required by the contract:—

Held, that they were not liable to make good to the estate the deficiency resulting from a re-sale of the property afterwards, they having acted throughout with good faith and to the best of their judgment.

Under the above Acts executors and administrators are not in all respects in the same position as trustees for sale of the lands. Upon the latter is cast a duty to sell and dispose of them; upon the former a mere discretion to be exercised only for certain purposes and in certain events.

C. St. Clair Leitch, for the widow.

Talbot Macbeth, for the executors.

Betts, for the official guardian.

[MACMAHON, J., 19TH MARCH, 1895.]

MCINTYRE v. FAUBERT.

Assignee for creditors—Sheriff—Sale of lands—Statute of Frauds—Sufficient memorandum—Signature of sheriff.

Action tried at Cornwall.

The plaintiff, sheriff of the county, as assignee of an insolvent under R. S. O. c. 124, advertised the sale of the equity of redemption of certain lands of the insolvent, which were subject to incumbrances. He was represented at the sale by the deputy sheriff, who verbally announced that the property was sold subject to the mortgages, and the defendant purchased for \$10, which he paid. A receipt was given to the defendant for the

\$10, stating it to be "the purchase money on village lot 4 in Lancaster," being the lands in question, which receipt was signed by the deputy sheriff. Afterwards the first mortgagees sold the land for about \$500 less than what had been stated to be at the sale the amount of the incumbrances on it, and this action was brought claiming the said deficiency as damages for breach of the alleged implied covenant of the defendant to pay off the incumbrances.

Held, that the above receipt was not a sufficient memorandum within the Statute of Frauds to bind the defendant. The sheriff selling as assignee was in a different position to that of a sheriff selling under an execution, who is the agent of both vendor and purchaser, and can sign a memorandum to bind a purchaser in the same way as an auctioneer can. But the signature of the sheriff as assignee is not sufficient.

Held, further, that the conditions and particulars, which did not set out the incumbrances, could not be added to by verbal declaration at the time of sale.

A. I. Macdonell, for the plaintiff.

D. B. MacLennan, Q.C., for the defendant.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 28RD MAY, 1895.]

In re FRANKLIN v. OWEN.

Prohibition—Division Court—Jurisdiction—Garnishing claim—Primary debtor abroad—Garnishees—Place of carrying on business—Cause of action—57 V. c. 23, s. 12.

Upon an appeal by the primary creditor from the order of STREET, J., *ante*, p. 158, granting prohibition, upon the ground that no Division Court except that of the division in which the cause of action arose had jurisdiction, his order was affirmed by a Divisional Court composed of MEREDITH, C.J., and MACMAHON, J., upon the same ground.

Kilmer, for the primary creditor.

Swabey, for the primary debtor.

Totten, Q.C., for the garnishees.

[OSLER, J.A., 13TH APRIL, 1895.]

TAYLOR v. REGIS.

Evidence—Corroboration—Two defendants in same interest—R. S. O. c. 61, s. 10—R. S. O. c. 1, s. 8, s.-s. 24.

Where in an action by an executor of a deceased mortgagee against two mortgagors, both the mortgagors deposed to certain payments made in the lifetime of the mortgagee, but which the plaintiff disputed :—

Held, that the fact of both the mortgagors testifying to such payments did not constitute corroboration within the meaning of R. S. O. c. 61, s. 10.

Each mortgagor was an opposite or interested party in the same degree and of the same kind, and constituted together an opposite or interested party within the meaning of the section.

Alexander Stuart, for the plaintiff.

H. B. Elliot, for the defendant.

IN CHAMBERS.

[ROSE, J., 13TH MAY, 1895.]

LENNOX v. STAR PRINTING AND PUBLISHING CO.

Security for costs—Libel—Newspaper—R. S. O. c. 57, s. 9—Defence—Denial—Good faith—Appeal.

In an action of libel against the publishers and editors of a newspaper, the defence suggested by affidavits filed upon an application under R. S. O. c. 57, s. 9, for security for costs, was that the statements complained of as defamatory did not refer to the plaintiff.

The Judge who heard an appeal from an order made by a Master for security, being of opinion that, upon the fair reading of the statements complained of, they did refer to the plaintiff :—

Held, that it did not appear that the defendants had a good defence on the merits and that the statements complained of

were published in good faith, and therefore the order should be set aside.

Swain v. Mail Printing Co., 16 P. R. 132, distinguished.

Neville, for the plaintiff.

Gunther, for the defendants.

[FALCONBRIDGE, J., 6TH MAY, 1895.]

In re McGOLRICK v. RYALL.

Prohibition—Division Court—Promissory notes—Separate causes of action—Title to land—Liquors drunk in tavern—Indemnity bond for lost note.

The plaintiff, a liquor dealer, sold liquors to the defendant, a tavern keeper, and took a note for the amount, \$388, on which he brought an action. In settlement of the action the defendant gave security by a deed of land, but stipulated by agreement for an account when it should be sold. A new note was given, which was subsequently divided into three notes of \$125 each.

On a motion for prohibition :—

Held, that each \$125 note afforded a separate cause of action, and could be sued upon in a Division Court.

2. That the title to land did not come in question.

3. That the words “ liquor drunk in a tavern or alehouse ” in s.-s. 2 and “ such liquors ” in s.-s. 3 of s. 69 of the Division Courts Act mean liquors drunk in a tavern or alehouse of the vendor.

Held, also, that the non-filing of a bond of indemnity for a lost note is a matter of practice, and not a ground for interference with the Division Court.

D. Armour, for the defendant.

W. H. Blake, for the plaintiff.

[14TH MAY, 1895.]

HAGER v. JACKSON.

Costs—Scale of—Action on bond—Penalty—Ascertainment of amount recoverable—R. S. O. c. 47, s. 19.

In an action on a bond for \$500 given to secure payment of costs of the Supreme Court of Canada in a prior action, judgment was given for the plaintiff for \$318.55, the amount at which such costs were taxed and certified in the Supreme Court.

Held, that the amount recovered was not ascertained by the act of the parties or by the signature of the defendants, within R. S. O. c. 47, s. 19, and the plaintiff was entitled to costs of the action on the scale of the High Court.

MacGregor, for the plaintiff.

George Ross, for the defendants.

[MACMAHON, J., 20TH MAY, 1895.]

In re THOMAS' LICENSE.

Prohibition—License commissioners—R. S. O. c. 194, s. 21—Tavern license.

The granting of a license under the Liquor License Act by a board of license commissioners imposes no duty or obligation upon any individual; and the Court will not make an order prohibiting commissioners from entertaining or hearing an application for a license.

Regina v. Local Government Board, 10 Q. B. D. at p. 321, and *Re Godson and City of Toronto*, 18 S. C. R. 86, followed.

Semble, that an application under the latter part of s. 1 of R. S. O. c. 194 for an additional tavern license in a locality largely resorted to in summer by visitors, may be made at any time, so long as the license does not extend beyond the prescribed period of six months from the first day of May.

J. J. Maclaren, Q.C., and *W. H. Lockhart Gordon*, for the motion.

McCarthy, Q.C., and *Haverson*, for the applicant.

W. M. Douglas, for the commissioners.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 15TH MAY, 1895.]

GOGGIN v. KIDD.

*Husband and wife—Interpleader as to crops claimed by husband's creditors—
Lease to wife—Hiring of husband.*

Interpleader to try the question of ownership of grain seized by a sheriff under executions against William Goggin and claimed by his wife against the execution creditors. The husband owned and farmed the land up to the autumn of 1898, when he became financially involved; executions were in the sheriff's hands, and chattel mortgages covered most of his stock, implements, and crop. A loan company held mortgages on the land, on which interest was in arrear, and had served the husband with notice that they would take possession unless the arrears were paid. The wife then took a lease of the farm from the company's agent, and proceeded to work it; she also had a written agreement with her husband to work for her at \$20 a month, and she hired other men and looked after the farm generally. When the wife undertook to farm for herself she had no means of her own. Most of the crop that was claimed was grown on land ploughed and prepared for seed by her husband in the previous autumn, and some of the seed from which the crop was grown belonged to him. After the wife had leased the land, she and her husband and their family continued to live in the homestead, and the actual farm work was done for the most part by the husband and two men who had worked for him before the lease was made to the wife; though the husband only worked for part of the time, as during the summer he was away training horses, and again in the autumn he travelled with a threshing outfit.

The case was tried before KILLAM, J., who entered a verdict for the plaintiff, the wife, holding that she had obtained an

interest in the land which was her separate property, and the farming operations had been carried on as her separate occupation.

The defendants appealed.

Held, DUBUC, J., dissenting, that the verdict entered for the plaintiff should be set aside and a verdict entered for the defendants with costs.

Looking at all the circumstance of the case and the terms of the lease, it might be said that the company's agent was merely making use of the company to enable the husband to transfer the lands to the wife with the object of defrauding his creditors.

Even if the wife did acquire an interest in the lands that was her separate property, it was still necessary for her to prove that she had farmed the lands as her own occupation separately from her husband. The evidence was not sufficient to establish a separate occupation; it suggested the suspicion that the wife's assuming to carry on the farm was colourable and little more than nominal, and that the husband had a part in the conduct and management as well as in the manual work of the farming operations of which the grain in question was the proceeds, and the plaintiff had not proved her right to the same.

Cooper, Q.C., and *Barrett*, for the plaintiff.

Culver, Q.C., for the defendants.

[18TH MAY, 1895.]

WOOLLACOTT v. WINNIPEG ELECTRIC STREET
RAILWAY CO.

Jury—Application for—Action for damages—Special circumstances.

Appeal from decision of DUBUC, J., *ante*, p. 118, dismissed with costs.

Held, that the onus rested on the plaintiff of showing that the case should be tried by a jury rather than by a Judge; the order should not be made unless some substantial reason is shown for it; and the plaintiff failed to show any such reason here.

Case v. Laird, 8 Man. L. R. 461, followed.

Per KILLAM, J.—Considering that there was nothing in the subject-matter of the suit calling for the judgment of a jury rather than that of a Judge; that there is a tendency on the part of jurors in such a case as this to be swayed by feelings of sympathy for the plaintiff rather than by impartial judgment; that new questions of law would not improbably arise at the trial; and that the case for the applicant was weak the appeal should be dismissed.

Perdue, for the plaintiff.

Munson, Q.C., for the defendants.

REGINA v. GOLDSTAUB.

Criminal law—Criminal Code, s. 354—Fraudulent concealment of goods by the owner.

The prisoner was tried on an indictment containing three counts, two for setting fire to a building, and the third for having unlawfully concealed a large number of goods specified in the indictment, being goods capable of being stolen and being the property of the prisoner, for a fraudulent purpose, to wit, for the purpose of obtaining from certain insurance companies insurance moneys upon the goods as if they had been destroyed by fire and of then keeping the goods for his own use.

The prisoner was found not guilty upon the first two counts, but was convicted upon the third count, subject to the opinion of the full Court upon a question reserved. The goods in question were inanimate and movable things, the absolute property of the prisoner, part of his stock in trade, and of the property insured by the insurance companies. These companies had not any property or interest in the goods or in any of them save as such insurers. The Judge found that the prisoner concealed the goods with the intent of keeping them for his own use and of obtaining from the insurance companies the full amount of the insurance moneys; and he found as a fact that the purpose of the prisoner was a fraudulent purpose.

The question reserved for the opinion of the Court was whether the prisoner, under the circumstances, was guilty of an indictable offence under s. 854 of the Criminal Code, 1892.

It was argued on behalf of the prisoner that a man could not under s. 854 be convicted of concealing his own goods, and that the words "takes, obtains," refer to goods of another, and therefore the other words "removes or conceals" must do so also.

Held, that the question must be answered in the affirmative and the conviction sustained. The section was intended to cover every case, the case of another's goods and the case of the owner's own goods. The terms were certainly wide enough to do so. The words at the end of the section, "anything capable of being stolen," do not mean anything capable of being stolen by the accused. They seem to indicate that this particular section refers to and includes anything which comes within the definition given in s. 808.

The Judge found that the concealment of the goods was for a fraudulent purpose, so that, even if the concealment was in itself an innocent act, the intent and purpose being criminal, the act became criminal.

Scholefield's Case, Cald. 397, and *Rex v. Sutton*, 2 Str. 1074, followed.

Maclean, for the Crown.

Hagel, Q.C., and *Elliott*, for the prisoner.

CREDIT FONCIER FRANCO-CANADIEN v. SCHULTZ.

Equity pleading—Bill by judgment creditor to set aside fraudulent conveyance—Allegations as to judgment and registration of certificate.

Appeal from the decision of Dubuc, J., *ante*, p. 77, allowed, the order in the Court below reversed, and the demurrer allowed with costs. There was no allegation whatever that the decree, of which a certificate was registered, was a decree ordering money, costs, charges, or expenses to be paid. That the bill, which was on behalf of the plaintiffs, as individual creditors, did not allege the registration of any judgment or of a

decree ordering the payment of money, was sufficient to make it defective.

It was contended on behalf of the plaintiffs that, notwithstanding the insufficient allegations of a lien or charge, the bill made a sufficient case for setting aside the deeds as fraudulent, but, as it was not filed on behalf of the plaintiffs and all other creditors, this contention was held untenable.

Reese River Mining Co. v. Atwell, L. R. 7 Eq. 847, and *Longway v. Mitchell*, 17 Gr. 190, explained.

Howell, Q.C., and *Huggard*, for the plaintiffs.

Tupper, Q.C., and *Phippen*, for the defendant.

[KILLAM, J., 27TH APRIL, 1895.]

STOVER v. MARCHAND.

Mortgage—No payment for over ten years—Statute of Limitations.

The plaintiff sued as assignee of a mortgage of lands made by Francois Marchand, dated 2nd April, 1888. for foreclosure and possession. The principal and interest secured fell due on 1st January, 1884, and nothing had been paid on account of principal or interest; Marchand died intestate on 1st October, 1884, leaving a widow and two children, the defendants, who were in possession and entitled to the equity of redemption. The defendants disputed the right of Marchand to any interest in the lands or to incumber them, and set up title in themselves under a patent from the Crown; they also pleaded the Statute of Limitations.

The evidence showed that Marchand was in actual possession of the lands at the date of the mortgage and thereafter until his death, and that since that date the defendant Marie Marchand had remained in possession by herself or her tenants. The land was unpatented when the mortgage was made, and so remained until 31st May, 1886, when the patent issued in favour of the widow and two children.

Held, that the right of action was barred by the Real Property Limitations Act, 46 & 47 V. c. 26, R. S. M. c. 89, ss. 4, 24. It appeared immaterial whether it was the 4th or 24th

section which applied. The view taken by the Chancery Divisional Court in Ontario in *Fletcher v. Rodden*, 1 O. R. 55, that such a suit was one for the recovery of land, was a correct one. The mortgagee's right to bring this suit first accrued in January, 1884, and his right to receive the mortgage money first then accrued; the bill admitted that there had been no payment of principal or interest.

Bill dismissed with costs.

Patterson and Baker, for the plaintiff.

Hough, Q.C., for the defendant Marie Marchand.

Wade, for the infant defendants.

[2ND MAY, 1895.]

WATEROUS ENGINE WORKS CO. v. WILSON.

Security for costs—Action by incorporated company—Head office in Ontario—Dominion charter—Carrying on business in Manitoba—Unincumbered real estate in Manitoba.

Motion for security for costs in a suit in equity. The plaintiffs were described in the bill of complaint as of the town of Brantford, Ontario, an incorporated company, duly licensed to carry on business in Manitoba. The defendants filed an affidavit showing that the plaintiffs had not obtained a license to do business in Manitoba under R. S. M. c. 24 and amending Acts. In answer it was shown that the plaintiffs were incorporated under a Dominion charter about 1874, which authorized them to carry on business in any Province or part of Canada; that for the last thirteen years they had had, and still had, a branch of their business in Winnipeg, and carried on business in this Province; that the company owned lands in Winnipeg valued at \$9,000, free from incumbrances, and had within the Province assets liable to execution and unincumbered to the value of at least \$35,000.

Held, that, apart from the question whether the plaintiffs, even though without a Provincial license to carry on business in Manitoba, were to be deemed non-residents, the possession of

the real estate described would be a complete answer to the application.

Application dismissed with costs.

Sutherland, for the plaintiffs.

Clark, for the defendant.

[BAIN, J., 14TH MAY, 1895.]

In re CUDDY.

Municipal corporation—Mandamus to clerk to furnish copies of documents to ratepayers.

Application by a ratepayer calling upon the clerk of a municipality to show cause why a mandamus should not issue against him commanding him to furnish the ratepayer with copies of two resolutions passed by the council, on payment of the proper fee therefor.

Held, that the rule *nisi* must be made absolute. The duty of the clerk to allow inspection and to furnish copies was purely ministerial, and he had no discretion in the matter. It was a duty that was properly enforceable by mandamus. The imposition of a fine on the clerk under 56 V. c. 28, s. 4, might not afford the applicant a beneficial or effectual remedy, and that provision should not prevent the Court from granting a mandamus where that would be the only effective remedy.

Rule made absolute without costs.

As, since the rule *nisi* was granted, the applicant had obtained the information he wanted from the clerk, it was ordered that the writ itself should not be issued without a further order.

Howell, Q.C., and *Haney*, for the applicant.

Hagel, Q.C., and *Thomson*, for Cuddy.

LAW v. NEARY.

Summary judgment—Motion for—Conditional leave to defendant—Discretion of referee.

Upon an application for summary judgment, the referee made an order giving the defendant leave to defend on

condition that within one week from the date of the order he should pay into Court \$613.80. The defendant appealed against the order in so far as leave to defend was made conditional upon the payment of the sum mentioned into Court.

The plaintiff sued to recover a balance of \$1,713.80 for goods sold and delivered. The defendant swore he had a good defence on the merits; that there was an overcharge in the plaintiff's account; and claimed a set-off; he also stated that he gave the plaintiff an order upon a loan company, which he accepted, and upon which some moneys had been paid to him. The defendant was credited on the indorsement on the writ of summons with \$800 paid on account and received by the plaintiff from the loan company on the order; but from the defendant's examination it appeared that he had since cancelled the order given the plaintiff, so that he could have no defence of any kind founded on that order: his examination showed also that it was far from clear that he had a valid defence or claim against the plaintiff in respect of the overcharges or set-off. As to at least \$613.80 the defendant could have no valid defence, and the referee might have let the plaintiff have judgment for that amount and given leave to defend for the balance, but the defendant desired to defend for the whole amount, and the referee allowed him to do so on giving security, and in fixing the amount he was apparently guided by the amount of the claim for which the plaintiff in any case would be entitled to recover.

Held, that the appeal must be dismissed with costs to the plaintiff in any event.

Under A. J. Act, s. 32, the referee had jurisdiction to make the leave to defend conditional, and there was no reason shown that would justify interfering with the discretion he had exercised.

English Judicature Act, Order XIV., Rule 6; *Rotheram v. Priest*, 49 L. J. C. P. 104; and *Oriental Bank v. Fitzgerald*, W. N. 1880, p. 119, specially referred to.

Pitblado, for the plaintiff

Elliott, for the defendant.

[18TH MAY, 1895.]

INMAN v. RAE.

Chattel mortgage—Affidavit of execution not signed by commissioner—Invalidity of.

Appeal from the judgment of a County Court Judge. In an interpleader issue one Ramsay claimed the goods in question as against the execution creditor, under a chattel mortgage made by the judgment debtor to him dated 20th January, 1894.

The affidavit of execution of the mortgage on the copy filed was filled in and signed by the subscribing witness, but the jurat was not signed by a commissioner. The witness was sworn before a commissioner, who by an oversight did not sign the jurat on one of the duplicate copies. Both copies were sent to the clerk, who indorsed a certificate of filing on both; he returned one to the claimant or his solicitor, and retained the other, which happened to be the one without the signature of the commissioner. There was no delivery or change of possession of the goods.

The County Court Judge held the mortgage was valid and entered a verdict for the claimant, and the execution creditor appealed, contending the chattel mortgage was void and had not been filed in the manner required by s. 8 of the 'Bills of Sale Act, R. S. M. c. 10.

Held, that the appeal must be allowed with costs, the verdict set aside, and a verdict entered for the execution creditor with costs.

The written statement of the witness could not be considered to be an affidavit, even though he had sworn to its truth before a commissioner. The signature of the person having authority to administer the oath is an essential part of an affidavit. The mortgage did not comply with the requirements of the statute; that being the case, the execution creditor was entitled to the advantage the statute had given him.

Nesbit v. Cock, 4 A. R. 200; *Mowat v. Clement*, 3 Man. L. R. 592; *Roff v. Kreckler*, 8 Man. L. R. 230, followed.

The requirements of the statute as regards the formalities of execution and registration must be closely and particularly observed.

Ford v. Kettle, 9 Q. B. D. 187; *Robson v. Waddell*, 24 U. C. R. 574; *Farmers and Traders' Loan Co. v. Conklin*, 1 Man. L. R. 181, followed.

Ewart, Q.C., for the execution creditor.

Culver, Q.C., for the claimant.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[SCOTT, J., APRIL, 1895.]

McCARTHY v. BARTER.

Malicious prosecution—Conspiracy—Proceeding against advocate—Motion to strike name off roll—Reasonable and probable cause—Judgments on motion and appeal—Favourable termination of proceeding—No formal order on appeal—False charges in pleading—Trial on affidavits—Summary dismissal of action—Pleading—Malice—Documents—Aggravation of damages—Embarrassment—Prolixity—Costs.

Action by an advocate of the Supreme Court of the North-West Territories against Lizzie M. Barter, a former client of the plaintiff, and her father, Jeremiah Travis, also an advocate, for conspiring to procure and procuring an application to be made maliciously and without reasonable and probable cause to strike the plaintiff off the roll of advocates and to preclude him from practising as an advocate and for procuring certain proceedings to be taken against him in respect of such application.

The statement of claim consisted of seventeen paragraphs, in which were set out in detail the matters complained of, including the transcription at length of various summonses and

notices of motion served on the plaintiff by the defendants. The 17th paragraph was as follows :—

“ By reason of the premises the plaintiff has been injured in his character, reputation, and business, and for a long time prevented from following and transacting his lawful affairs and business, and was put to an expense of \$3,000 in defending himself, and suffered great pain of body and anxiety of mind.”

The defendants moved for an order dismissing the action on the ground that it was frivolous or vexatious, or striking out the statement of claim as being embarrassing and tending to prejudice the fair trial of the action, inasmuch as it contravened the rules of pleading by containing, not only a summary of the material facts on which the plaintiff relied, but also a statement of the evidence by which they were to be proved, and was verbose and prolix.

It appeared that McGUIRE, J., who had heard the application to strike the plaintiff off the roll, had made an order suspending and disqualifying him from practising as an advocate until the end of the next sittings of the Court *en banc*. It also appeared that the plaintiff had appealed from this order, and that the Court *en banc* had given judgment upon the appeal, but no order had been issued.

The statement of claim alleged “ that the said appeal having been heard by the Court *en banc*, the said Court was unanimous in reversing and setting aside the said order and judgment, and the plaintiff was acquitted of the said charge and said prosecution was determined.”

From the written opinions of the four Judges who heard the appeal it appeared that they were all of the opinion that the order of McGUIRE, J., should be set aside ; but two of them held the view that the plaintiff had been guilty of unprofessional conduct and that he should pay the costs, while the other two were in favour of allowing the appeal *in toto*.

For the defendants it was contended that the action would not lie, because the proceedings complained of were civil, and not criminal, proceedings ; that the only two exceptions to the rule that in all actions for malicious prosecution a criminal prosecution must be shown, were the presentation of a petition

in bankruptcy or a petition for the winding-up of a public company ; and that no action will lie for conspiring to bring a civil action, or for bringing such an action maliciously and without reasonable and probable cause.

Cotterell v. Jones, 16 C. B. 718, and *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 674 were relied on.

Held, that no principle was to be deduced from either of these cases which precluded the plaintiff from recovering in this action ; it was at least fairly open to argument that upon the principle laid down in the cases, the action would lie ; and there was no reason why a proceeding of the nature complained of should not be made a third exception to the general rule, especially where, as here, some other damage than costs had ensued.

It was further contended that the proceedings complained of showed that there was reasonable and probable cause for taking them, because the Judge who heard the application and two of the Judges who heard the appeal decided against the plaintiff.

Held, that the ruling or judgment of the Judge who heard the application was not conclusive as to the question of reasonable and probable cause, nor would the Judge at the trial of this action be bound to rule that by reason of such judgment there was reasonable and probable cause for making the application ; if this were laid down as a general rule, a person might suffer from the prejudices or capricious feelings of a Judge ; and it could not be said that two of the Judges who heard the appeal concurred in the judgment of first instance ; a number of charges were preferred against the plaintiff, and as to all of those in respect of which McGURK, J., found him guilty, the Judges who heard the appeal were unanimous in holding him not guilty.

Smith v. Macdonald, 3 Esp. 7 ; *Williams v. Taylor*, 3 Moo. & P. 350 ; and *Mellor v. Baddeley*, 2 Cr. & M. 675, discussed.

Held, also, that although there had been a termination of the proceeding unfavourable to the plaintiff as to some of the charges, there had been a favourable termination as to others, and it could not be said, therefore, that the action would not lie on account of the partly unfavourable termination.

Boaler v. Holder, 8 Times L. R. 546, specially referred to.

It was further contended that the proceeding complained of had not been determined at all.

Held, doubtful ; but upon this application it should not be decided that the issue of an order upon the appeal was a condition precedent to the plaintiff's right to recover.

It was further urged that material statements in the affidavits filed by the defendants showing the allegations in the statement of claim to be false had not been denied.

Held, that the existence of malice and of the absence of reasonable and probable cause was a matter to be deduced from the whole evidence at the trial, and the action should not be dismissed because the plaintiff had not, in answer to the defendants' affidavits, alleged his belief as to such existence.

Held, also, that where the Judge is not satisfied that the plaintiff cannot succeed in the action or that it is frivolous or vexatious or an abuse of the process of the Court, he should refuse to dismiss it summarily.

McEwen v. North-West Coal and Navigation Co., 1 N. W. T. Reps., part 2, p. 15, followed.

Upon the branch of the application which attacked the statement of claim as embarrassing, verbose, and prolix :—

Held, that malice and the absence of reasonable and probable cause could properly, under the rules of pleading in force, be alleged as facts without setting out the facts and circumstances from which they might be inferred, and the plaintiff could not be precluded at the trial from giving evidence of such facts and circumstances by reason of their not being set out in his pleading ; and therefore many of the paragraphs of the statement of claim were objectionable, being composed of statements of facts by which the plaintiff sought to show malice and want of reasonable and probable cause for the proceedings complained of.

Held, also, that it was improper to set out documents at length ; their effect merely should have been stated.

Held, also, that although there might be no sufficient ground for striking out paragraphs setting out matters in aggravation of damages, yet, as it did not clearly appear that

certain matters were pleaded merely in aggravation of damages, the pleading was objectionable.

The whole of the pleading was therefore struck out for embarrassment and prolixity.

The general costs of the application to be costs in the cause to the defendants, but no costs to be allowed to them in respect of the affidavits filed; the costs occasioned to the plaintiff by the filing of such affidavits, as well as of affidavits in answer, to be costs to the plaintiff in the cause.

P. McCarthy, Q.C., the plaintiff, in person.

Jeremiah Travis, for himself and his co-defendant.

IN CHAMBERS.

[ROULEAU, J., 18TH FEBRUARY, 1895.]

BARTER v. SWANN.

Taxation of costs—Notice—Time—Judicature Ordinance, s. 527.

The plaintiff obtained a summons to set aside the taxation of the costs of the defendant Charles W. Martin, the certificate of taxation, the judgment entered in favour of that defendant against the plaintiff, and the writ of execution issued thereon upon the ground, among others, that no proper or sufficient notice of the taxation was given to the plaintiff.

Notice of taxation was served on the plaintiff's advocates the day before the taxation.

By s. 527 of the Judicature Ordinance it is provided that "one day's notice of taxing costs" shall be given.

McCaul, Q.C., for the plaintiff, contended that "one day's notice" meant one clear day's notice, notwithstanding the provisions of s. 552 of the Judicature Ordinance, which provides that "in any case in which any number of days not expressed

to be clear days is prescribed in this Ordinance, the same shall be reckoned exclusively of the first day and inclusively of the last day.

P. McCarthy, Q.C., for the defendant C. W. Martin.

Held, that the notice of taxation was sufficient.

In re Railway Sleepers Supply Co., 29 Ch. D. 204, distinguished.

Edmunds v. Cates, 4 M. & W. 66, and *Grant v. McKenzie*, 16 L. J. Ex. 255, followed.

The other objections being technical, and no injustice having been done, they were not entertained.

Summons discharged without costs.

[10TH MAY, 1895.

KING v. ANDERSON.

Pleading—Denial—Avoidance—Embarrassment.

It was alleged by the statement of claim that certain lands of one Sproule had been advertised for sale by a sheriff under executions lodged by the plaintiffs; that the defendant had subsequently lodged an execution against the same lands; and, by paragraph 7, that the Creditors' Relief Ordinance came into force on the 1st January, 1894, and that the defendant claimed that by virtue thereof she was entitled to share in the distribution of the moneys to be realized by the sale. The prayer was for a declaration that the defendant was not entitled to share, and that the Ordinance, so far as it dealt with executions against lands, was *ultra vires*.

By paragraph 8 of the statement of defence the defendant pleaded that "she did not at any time claim to be entitled to share in the distribution of moneys to be realized by the sale of the lands under the plaintiffs' executions."

On motion by the plaintiffs to strike out this paragraph, on the ground of embarrassment :—

Held, that the plea was not a specific denial, but avoided the point of substance, namely, whether the defendant *now* asserted such claim ; and was therefore embarrassing.

Order made striking out paragraph 3, with leave to amend ; costs to the plaintiffs in any event.

McCaul, Q.C., for the plaintiffs.

P. McCarthy, Q.C., for the defendant.

[SCOTT, J., 26TH AND 30TH APRIL, 1895.]

McCARTHY v. TRAVIS.

Evidence—Discovery—Documents—Privilege—Cross-examination upon affidavit in interlocutory proceeding—Foreign commission—Necessity and materiality of witnesses—Attempt to procure attendance at trial—Necessity for examination in open Court—Special circumstances.

Action for libel. The alleged defamatory writing was contained in a letter written by the defendant to one St. John, editor of a newspaper published in the city of Winnipeg.

The plaintiff moved for an order for the issue of a commission to Winnipeg to take the evidence of St. John and other witnesses, and filed an affidavit in support of his motion, on which he was cross-examined by the defendant.

In an affidavit on production previously filed the plaintiff had admitted having in his possession copies of telegrams and letters sent by him, and a number of letters and a statutory declaration received by him, which he objected to produce because they were prepared and written solely with a view to the prosecution of this action, and for the purpose of obtaining evidence, or information leading to evidence, to enable him to come to a conclusion as to the bringing of the action, and for use in the conduct of it.

Upon cross-examination on his affidavit the plaintiff admitted that these documents related to the evidence of the witnesses whom he proposed to examine under the commission, but he declined to produce them or to state their nature or contents.

Held, that the documents were privileged, and discovery of them could not be compelled.

2. That the English Marginal Rule 504, providing that the practice with reference to cross-examination at the trial of an action shall extend and be applicable to evidence taken in any cause or matter at any stage, does not apply to cross-examination upon an affidavit filed on an interlocutory application, and the privilege in respect to the documents in question extended to such cross-examination.

3. *Seemle*, that such cross-examination should be confined strictly to allegations in the affidavit.

Upon the application for the commission it appeared that St. John had stated that the letter sent to him by the defendant had been sent back by him to the defendant at Calgary, but the defendant denied having received it.

The plaintiff did not show that any attempt had been made by him to procure the attendance at the trial of St. John or the other witnesses, nor that there was any difficulty in the way of their attending, nor that the taking of their evidence by commission would be a saving of expense.

The defendant in an affidavit said that he believed it to be necessary in the interests of justice that the evidence should be given orally at the trial; that from information received from his solicitors in Winnipeg he believed that St. John and one or more of the other witnesses were interested in assisting the plaintiff in establishing his case; that he believed the total expense of both parties of executing a commission at Winnipeg would be equal to the cost of bringing the witnesses to Calgary; and that it would be difficult for him to properly instruct counsel at Winnipeg by correspondence, and he would be at a serious disadvantage unless personally present at the examination.

Held, that the evidence was shown to be necessary and material to enable the plaintiff to prove publication, which was denied, and to prove the contents of the letter, if lost.

It is not necessary, in all cases where it is sought to examine a witness out of the jurisdiction, to show that an attempt has been unsuccessfully made to procure the attendance of the witness at the trial, but only in cases where, from peculiar circumstances, or from the nature of the evidence sought to be obtained, the Court is of opinion that the witnesses should be examined in open Court.

Lawson v. Vacuum Brake Co., 27 Ch. D. 137, and *Cock v. Allcock*, 21 Q. B. D. 178, explained and followed.

From the nature of the evidence here sought, there was no strong reason why it should not be given upon a commission instead of in open Court, nor was it conceivable that there could be any difficulty in instructing counsel at Winnipeg.

Order made for a commission; the costs to be in the discretion of the Judge at the trial.

P. McCarthy, Q.C., the plaintiff, in person.

McCaul, Q.C., for the defendant.

ONTARIO.



Supreme Court of Judicature.

COURT OF APPEAL.

10TH D.C., YORK.]

[OSLER, J.A., 10TH JUNE, 1895.]

LANG v. THOMPSON.

Parties—Description—Style of cause—Action by one plaintiff—Words “and Co.”—Amendment.

A person carrying on business alone, but in a name denoting a firm or partnership, cannot bring an action in that name. Where, however, such name consisted of his surname, prefaced by the initials of his Christian names, and followed by the words “and Co.”:—

Held, that these words in the style of cause in an action were mere surplusage, or, if not, that they should be struck out; and, as the mistake was trifling, and no one was misled or affected by it, an amendment at the trial should have been granted as of course.

Mason v. Mogridge, 8 Times L. R. 805, distinguished.

Judgment of the 10th Division Court in the County of York reversed.

Aylesworth, Q.C., and *F. J. Travers*, for the plaintiff.

Fair, for the defendant.

E. Saunders, a third party, in person.

F. F. Hodgins, for the garnishees.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 31ST MAY, 1895.]

CLOUSE v. COLEMAN.

Discovery—Bodily injury—Examination by medical practitioner—54 V. c. 11—Questions.

By 54 V. c. 11, it is provided that an order may be made directing that the person in respect of whose bodily injury damages or compensation is sought in an action "shall submit to be examined by a duly qualified medical practitioner."

Held, that the statute does not authorize the putting of questions by the medical practitioner to the examinee.

H. S. Osler, for the plaintiff.

Bristol, for the defendant.

[19TH JUNE, 1895.]

GENERAL ELECTRIC CO. v. VICTORIA ELECTRIC LIGHT CO. OF LINDSAY.

Pleading—Cross-counterclaim—Striking out—Cross-relief under Rule 374—Action on promissory note—Defence—Counterclaim—Parties—Rule 376.

Held, affirming the decision of MEREDITH, J., *ante* p. 160, 16 P. R. 476, that a person brought into an action as defendant to a counterclaim delivered by the original defendant cannot deliver a counterclaim against such defendant.

Street v. Gover, 2 Q. B. D. 498, followed.

Green v. Thornton, 9 Occ. N. 199, distinguished.

Semble, if the company brought in here as defendants by counterclaim had been proper parties, cross-relief might have

been given them, under Rule 374, by staying execution upon any judgment recovered against them until they should establish their set-off in an independent action.

The action was upon a promissory note. The counterclaim of the original defendants alleged that the plaintiffs took the note under circumstances which disentitled them to recover.

Held, a defence and not a counterclaim.

It further asked that the plaintiffs might be ordered to deliver up the note to be cancelled.

Held, that if that was a proper subject of counterclaim, it was one arising between the plaintiffs and the defendants as the result of the establishment of the defence, and did not render the introduction of new parties necessary.

It further asked that if the plaintiffs should be found entitled to recover upon the note, the new defendants by counterclaim should be ordered to pay it.

Held, not a matter in which the plaintiffs were concerned, and therefore, under Rule 376, other persons could not be brought in as defendants by counterclaim.

It further alleged that the plaintiffs and the new defendants by counterclaim conspired together with the fraudulent intention of keeping certain insurance moneys without applying them upon the note sued on; but there was no assertion that the plaintiffs received the insurance moneys, or any part of them, beyond the amount of the note; and the prayer was that the new defendants by counterclaim, and not the plaintiffs, should account for the insurance moneys over and above the amount of the note.

Held, that there was no excuse for joining the plaintiffs as parties liable to account with the added parties, and therefore no excuse for adding the latter.

And the counterclaim of the original defendants, so far as it added new parties, was struck out.

J. A. Paterson, for the Canadian General Electric Co., defendants by counterclaim.

W. M. Douglas, for the Edison General Electric Co., defendants by counterclaim.

C. Millar, for the original defendants.

GRAHAM v. TEMPERANCE AND GENERAL LIFE INS.
CO. OF NORTH AMERICA.

*Discovery—Action for account—Production of books of account—Discretion—
Preliminary trial of right to require account—Rule 655.*

Whenever discovery is sought in aid of an issue which must be determined at the hearing, the plaintiff is entitled to it to help him prove the issue; but where it is sought in aid of something that does not form part of what he must prove at the hearing, but is merely consequential to it, the right is not absolute, but discretionary, until the plaintiff has established his fundamental right at the hearing.

Where the plaintiff claimed a declaration of the right of himself and all other persons insured in the temperance section of the defendant company to the profits earned by that section, payment thereof, and an account and apportionment thereof:—

Held, that upon the mere statement of the plaintiff in pleading that he was the holder of a policy entitling him to share in certain profits of the company, and without any proof of the statement, the Court, in its discretion, should not require the company to produce and lay open to him all their books of account and the papers relating to them; but it was a proper case in which to permit the defendants to apply under Rule 655 for an order for a preliminary trial of the plaintiff's right to require an account, and to postpone discovery of the books until after such trial.

C. D. Scott, for the plaintiff.

W. H. Blake, for the defendants.

[OSLER, J.A., 22ND MAY, 1895.]

McCULLOUGH v. CLEMOW.

*Interest—Trade agreement—Payment of net profits—Ascertainment—R. S.
O. c. 44, ss. 85, 86—Damages for delay—Costs.*

The defendant, by a written instrument, agreed with the plaintiffs that during one year he would sell coal at the

plaintiffs' prices, and that the net profits over \$3,000 should be the property of the plaintiffs, and should be deemed to be money received by the defendant for the use of the plaintiffs. The net profits were to be ascertained in manner set forth in clause 6 of the agreement, by a named accountant, on or before the 10th May, 1885. There was also by clause 8 a provision for a reference to the same accountant in case of dispute. There was no provision as to interest.

This action was brought on the 30th April, 1891, to recover \$581, the amount of the net profits as ascertained by the accountant under clause 6. Clause 8 was not invoked by either party. At the trial it was held that the determination of the amount under clause 6 was void because it was not made until after the 10th May, 1885; and a reference to a Master was ordered to take an account of the net profits under the agreement. The Master reported that \$706.68 and interest was due to the plaintiffs, but upon an appeal the report was sent back, and a new report was afterwards made finding \$501.11 and interest as the amount due.

Held, that a contract to pay interest could not be implied from the dealings of the parties, and, there being no express contract, the case was not one in which interest was payable "by law," and therefore it did not come within the first branch of s. 85 of the Ontario Judicature Act, R. S. O. c. 44; nor did it come within the second branch, as a case in which it had been usual for a jury to allow interest, for no debt existed which was payable until it was ascertained, either in the manner provided by the agreement, or, in default of that, by means of the account taken in the action.

Smart v. Niagara and Detroit Rivers R. W. Co., 12 C. P. 404, and *Michie v. Reynolds*, 24 U. C. R. 303, distinguished.

2. That the mode of computation provided by the contract being departed from, no certainty remained as to the amount payable or the time of payment, which could not be said to arrive until the final decision of the issues raised in the action; nor did all the elements of certainty appear by the contract, so as to require nothing more than an arithmetical computation to ascertain the exact sum or the exact time for payment; and therefore there was no debt or sum certain, payable by virtue of a written instrument at a certain time, within the meaning of s. 86, s.-s. 1.

Merchant Shipping Co. v. Armitage, L. R. 9 Q. B. 99, and *London, Chatham, and Dover R. W. Co. v. South Eastern R. W. Co.*, [1892] 1 Ch. 120, [1893] A. C. 429, followed.

Spartali v. Constantinidi, 20 W. R. 823, considered.

3. That, having regard to the delay in bringing the action, and the fact that the omission of the accountant to make his award or computation within the time fixed by the 6th clause of the agreement was not attributable to the misconduct, delay, or default of the defendant, the plaintiffs were not equitably entitled to damages in the nature of interest for the delay in payment.

Consideration of the question of costs.

Shepley, Q.C., and *J. Christie*, for the plaintiffs.

O'Gara, Q.C., for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 27TH MAY, 1895.]

In re SOLICITORS.

Costs—Solicitor and client—Taxation—Application by solicitor—Retainer disputed by one of two alleged clients—Multiplicity of proceedings—Taxation as to quantum—Question of liability reserved.

Where the solicitors sought to obtain an order for taxation of certain bills of costs against two alleged clients, one of whom disputed the retainer and opposed the application :—

Held, reversing the decision of STREET, J., in Chambers. MEREDITH, J., dissenting, that, in order to avoid multiplicity of taxations, the usual order for taxation should be made as against the unresisting client; such taxation to be on notice to the other, who was to be at liberty to attend and intervene if so advised; and such taxation to be conclusive against him as to the *quantum* of liability, in case he should be ultimately found liable in an independent proceeding.

Per BOYD, C., and ROBERTSON, J.—In strictness the solicitor may take out the common order to tax his own costs, even

though he knows that the alleged client disputes his retainer as to the whole bill, and the client is at liberty thereunder to dispute every item on the ground of "no retainer;" but in such a case it is not well to force the client to contest the question of retainer before the Master, if he desires it to be tried by a Judge or a jury, and to accomplish this the taxation should be limited to the *quantum* of liability.

Per STREET and MEREDITH, JJ.—It is reversing the proper order of events to allow a solicitor to put his alleged client to the expense of a taxation without requiring him first to show that he has a claim upon the client for the bill when taxed.

In re Jones, 86 Ch. D. 105; *In re Salaman*, [1894] 2 Ch. 201; and *In re Totten*, 27 U. C. R. 449, discussed.

Aylesworth, Q.C., for the solicitors.

W. H. Blake, for the respondent, one Adair.

[1st JUNE, 1895.]

POLLARD v. WRIGHT.

Venue—Change of—Cause of action—Residence of parties—58 V. c. 13, s. 21—"Good cause."

By s. 21 of 58 V. c. 13, it is provided that every action in the High Court shall be tried in the county in which the cause of action arises, in case all the parties reside in that county, provided that, "for good cause shewn," a Judge may order the action to be tried in another county.

Held, that this applied to an action pending before it was passed; and that where the cause of action arose and all the parties resided in one county, a very strong case would have to be made before a trial in another county would be ordered.

C. H. Widdifield, for the plaintiff.

Masten, for the defendant Milling.

CLARKSON v. DUPRÉ.

*Writ of summons—Service out of jurisdiction—Rules 271 (e), 1309—
“Tort”—Action to set aside preferential transfer of goods.*

Action against defendants residing in the Province of Quebec, brought by the assignee for the benefit of creditors of one of them, for a declaration that the transfer of certain goods in Ontario by the assignor to the other defendant, which goods had since been removed to the Province of Quebec, was preferential and void and should be set aside, and for an order for delivery up of the goods or the proceeds to the plaintiff, and for an account.

Upon an application to set aside the writ of summons and the service thereof upon the defendant transferee out of the jurisdiction:—

Held, that the action was founded on a “tort committed within the jurisdiction,” within the meaning of Rule 271 (e), as amended by Rule 1809.

Per BOYD, C.—A restricted construction ought not to be given to the language of the Rule. The ground of complaint rests on statutable tort; the method of investigation is accidental.

Per MEREDITH, J.—Substantially the action is in trover. Under the statute the transaction, as alleged by the plaintiff, is avoided; the goods become and the proceeds of them are the property of the plaintiff, and this defendant has converted them to his own use.

R. McKay, for the plaintiff.

W. E. Middleton, for the defendant Dupré.

In re DRURY NICKEL CO.

Costs—Winding-up of company—Creditors' solicitors—Payment out of assets—Services and attendances—Regulation of.

Upon a reference for the winding-up of a company the referee appointed a firm of solicitors to represent the general body of creditors, and ordered that they should be notified to attend whenever he so directed, and that their costs, as between solicitor and client, should be paid out of the assets.

Held, that this class of order and liability was not favoured by the Courts, and should be invoked and attendances thereunder had only when there was any special question on which the appearance of some one to represent the creditors was desirable; that attendances should not be paid for out of the assets except where contemporaneously approved of by the referee; and it was not proper practice to extend this at the close of the proceedings by obtaining a certificate from him that, had he been applied to from time to time, he might have provided for other attendances and services.

Order of MEREDITH, C.J., reversed.

F. J. Travers, for the liquidator.

D. Armour, for the solicitors.

[ARMOUR, C.J., 3RD APRIL, 1895.]

LOVE v. WEBSTER.

Assessment and taxes—Tax sale—Setting aside—Assessment Act, 55 V. c. 48, ss. 121, 140, 141.

In an action to set aside a sale of land for taxes, on the ground of irregularities:—

Held, following *Town of Trenton v. Dyer*, 21 A. R. 379, that the provisions of s. 121 of the Assessment Act, 55 V. c. 48, are imperative, and that a roll made and transmitted thereunder not complying therewith is a nullity.

Held, also, that the non-compliance with the provisions of ss. 141 and 142, before the sale, was also a fatal objection to its validity; and the sale was set aside.

G. M. Macdonnell, Q.C., for the plaintiff.

J. L. Whiting, for the defendant.

[ROBERTSON, J., 1ST APRIL, 1895.]

In re CANADIAN RELIEF SOCIETY.

PATTERSON'S CASE.

Company—Winding-up—Friendly society—Insurance Corporations Act, 1892—Certificate-holder—Default in payment of assessments—Membership—Forfeiture—Suspension—Rules of society—Liability as contributory.

By the general laws of a friendly insurance society, certificated under the Insurance Corporations Act, 1892, it was provided that a certificate-holder should forfeit membership upon failure to pay the regular monthly assessments within a specified time, but might regain it by payment within three months of all that might be due at the date of payment, together with cost of notice or fine. The constitution of the society contained a provision that a member in good standing might sever his connection with it by making the proper application, paying all dues, and surrendering his beneficiary certificate and all rights and benefits of membership.

Held, that a certificate-holder who had ceased to pay his assessments, but had taken no other means of terminating his connection with the society, remained a member entitled to the benefits thereof up to the end of three months after his last payment of a regular monthly assessment; and, being a member during the three months, was liable as a contributory, upon the winding-up of the society, in respect of the assessments made during the three months.

An appeal by J. J. Patterson from a report of the Master in Ordinary finding that the name of the appellant should be placed upon the list of contributories in the winding-up of the above-named society.

The society received its certificate from the Registrar of Friendly Societies, pursuant to the Ontario Insurance Corporations Act, 1892, as a friendly society for the transaction of insurance against illness, disability, and death, in the Province of Ontario, for the term beginning 31st August, 1892, and ending 30th June, 1893, subject to the provisions of the Act. On the 19th June, 1894, under s. 49 of the Act, its registry was absolutely revoked and cancelled. The society had been in existence before this and since 30th November, 1886, under the name of the Canadian Ancient Order of United Workmen Relief Society, which name was changed by order in council of 30th June, 1892, to the above.

On 30th June, 1888, the appellant, on his application, received a beneficiary certificate entitling him to all the

benefits of the society, enumerating them, upon the conditions, among others, that he should maintain his good standing in his Ancient Order of United Workmen Lodge, and that he should pay all assessments in the Canadian Ancient Order of United Workmen Relief Society within twenty-eight days from the date of issuing.

Across the face of this certificate was printed an acceptance signed by the beneficiary, in these words : " The undersigned to whom this certificate is granted hereby accepts the same, with the conditions named therein, as well as those contained in the constitution of the society."

The general laws of the society contained this provision : " A certificate-holder shall forfeit membership upon failure to pay to the local relief circle, or, in case there is none, to the secretary, the regular monthly assessment or beneficiary dues or general dues, on or before the first day of the month following that in which said payment is due and payable, but may regain it by payment within three months of all that may be due at the date of paying, together with the cost of notice or fine of that department Suspended members in all departments, if not reinstated within three months, must be re-examined and approved by the society before reinstatement."

The constitution of the society contained this provision : " 32. A member in good standing may sever his connection with the society by making the proper application therefor in writing, and paying all dues charged against him, or for which he is liable, up to and including the date of said application, surrendering the beneficiary certificate in writing, together with all rights, benefits, and privileges that may have been acquired by virtue of membership in the society, when a final card in the form prescribed, and without extra charge, shall be issued to him."

The beneficiary laws of the society contained these provisions : " Members of this department shall pay regularly on or before the first day of every month to the local or general secretary, as they may be directed, the sum of \$1.25 towards the benefit fund of this class ; the above payment to be made regularly and without notice, except such as may be given at the option of the society ; and if at any time there should

arise from unforeseen causes, a necessity for more funds to pay claims than the above would yield, one special assessment *per annum* may be issued on the members of this class for sufficient funds to pay off all claims to date; such assessment to be levied in the month of November.

Any member neglecting to pay the beneficiary and other dues, before the first of the following month is thereby suspended, and shall pay a fine of 25 cents prior to reinstatement. If suspended for three months or over, the member must be re-examined and approved before reinstatement."

The evidence established that the beneficiary paid the assessments up to the end of October, 1893, from which time he ceased paying, and he took no other means of terminating his connection with the society, although there were other ways of doing so. If he had continued paying his assessments, he would have paid a regular one in November of \$1.25 and a special one of \$2.50, and after November up to the time when the registry of the society was cancelled, seven regular monthly assessments of \$1.25 each; making in all \$12.50.

The appeal was argued before ROBERTSON, J., in Court, on the 10th January, 1895.

Aylesworth, Q.C., for the appellant.

Duncan, for the receiver of the company.

Judgment was delivered on the 1st April, 1895.

ROBERTSON, J.—After much consideration, the conclusion I have come to is that the beneficiary remained a member entitled to the benefits arising up to any time before the end of three months after he had paid the last regular assessment, but during that time, after the first default, he was in suspension, unless before the end of three months he had paid the fine of 25 cents; so that, to all intents and purposes, he was a member during the currency of the three months, entitled then, on payment of the fine and back assessments, to all the benefits; but so soon as the three months had expired, he ceased to be so entitled. It follows, therefore, that, being such member, although under suspension, he is liable to contribute and pay the regular monthly assessments of \$1.25 each for the months of November, December, and January, \$3.75, and the special assessment made in November, \$2.50; in all \$6.25; and consequently the

Master was right in placing his name on the list of contributories.

If the appellant had desired to sever his connection with the society by any other means, and without waiting for the means by which forfeiture is brought about, the constitution of the society, clause 32, above quoted—and for that matter s. 39, s.-s. 2, of the Insurance Corporations Act, 1892—affords authority for his so doing, and points out that, by making the proper application therefor in writing and paying all dues charged against him, he may cease to be a member; but not having done so, he remained in connection, entitled to all benefits, during the currency of the three months; and being so entitled, it follows that he must pay all assessments up to and inclusive of that time.

I have considered the following authorities: *McGeachie v. North American Life Insurance Co.*, 20 A. R. 187, 23 S. C. R. 148; *Manufacturers' Life Insurance Co. v. Gordon*, 20 A. R. 809; *Frank v. Sun Life Insurance Co.*, 20 A. R. 564, 23 S. C. R. 152; no one of which, in my humble judgment, supports the appellant's contention, but rather the contrary, I should say, inasmuch as in the first named case there seems to be an intimation that the company might have reasonably insisted upon payment of the notes which the insured had given for the past due premiums, and cancelled the policy.

I have also referred to *McDonald v. Ross*, 29 Hun 87, where I find the learned Judges have come to the same conclusion that I have come to, in an almost parallel case.

I have also referred to Bacon on Benefit Societies, secs. 354, 414, as well as the Insurance Corporations Act, 1892.

I have not considered the question of liability after the end of the three months. It is sufficient for the purposes of this appeal to decide that the appellant is properly placed on the list of contributories. In my judgment, he is liable to pay the three regular and one special assessment at all events, and therefore he must contribute to that amount at least.

The appeal should, therefore, be dismissed with costs.

[ROBERTSON, J., 25TH MAY, 1895.]

HAGGERT v. TOWN OF BRAMPTON.

Interim injunction—Undertaking in lieu of—Duration of—Judgment after trial—Stay of entry—Injunction after trial, where undertaking violated.

Action for the return of certain goods or to recover their value, and for damages for detention or conversion, and for an injunction. Relying upon an undertaking given by the defendants Blain and McMurchy that nothing would be done to affect the position of the property pending the litigation, according to the plaintiff's version of the undertaking, or until after the trial, according to the defendants' version, the plaintiff did not apply for an interim injunction. The action was tried and judgment pronounced on the 6th April, 1895, directing that judgment be entered after the second day of the next sittings of the Divisional Court dismissing the action with costs. The next sittings of the Divisional Court were fixed for the 27th May, 1895.

Soon after the delivery of judgment the defendants began to dispose of the property the subject of the action, and on the 9th May, 1895, the plaintiff obtained from a local Judge an *interim* injunction restraining them from so doing.

The plaintiff also gave due notice of and set down for hearing a motion to the Divisional Court by way of appeal from the judgment of the trial Judge.

Upon motion to continue the injunction :—

Held, that an undertaking to refrain from doing such an act as the Court would restrain by injunction should be as implicitly observed as an injunction, and the Court, on application, will adopt the undertaking and give it the effect of an injunction, so far that the party relying on it will be enabled to make any infringement the subject of an application to the Court.

Injunction continued until the final disposition of the action.

Polini v. Gray, 12 Ch. D. 438; *London and Birmingham R. W. Co. v. Grand Junction Canal Co.*, 1 Eng. Rway. Cas. 224; and *Carroll v. Provincial Natural Gas and Fuel Co. of Ontario*, post p. 223, followed.

Justin, for the plaintiff.

T. J. Blain, for the defendants Blain and McMurchy.

[STREET, J., 11TH JUNE, 1895.]

In re MACPHERSON AND CITY OF TORONTO.

Arbitration and award—Municipal corporations—Expropriation of land—Compensation—View of premises—Effect of—Weight of evidence—Opinion evidence—Potential value of property—Improvements—Lands injuriously affected—Purchase money—Interest—Land, when “taken”—By-law—Jurisdiction of arbitrator.

An appeal by the city corporation from the award of a single arbitrator in respect of the amount of compensation to be paid to land-owners for an acre and a quarter of land expropriated by the corporation for a road, by a by-law passed on the 27th July, 1888, which described the road by metes and bounds, and provided “that the same is hereby taken and expropriated for and established and confirmed as a public highway or drive,” pursuant to which the corporation took possession of the land, and offered the land-owners \$2,600, which they refused. The arbitrator made his award on the 11th March, 1895, allowing the land-owners \$5,505 for the land taken, and \$10,095 for other lands injuriously affected, and interest on both sums from the date of the by-law.

Held, that where an arbitrator has viewed the premises, but it does not appear that he has proceeded partly upon his view, the Court should consider only the evidence taken before him, and should not give any greater effect to his findings than if he had not viewed the premises.

2. As to the weight of evidence, there was ample testimony to warrant the arbitrator, if he gave credit to it, in his findings; and it was not for the Court to say that he should have preferred the evidence of one set of witnesses to that of the other, in a matter especially where so much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions.

3. That the arbitrator was justified in taking into account the potential value of the property, when improved, after allowing for the cost of filling it in, as a means of arriving at its actual value; otherwise he would have been driven to say that the property in its existing shape not being useful for any purpose, he must refuse to allow anything for it, because it

might never be filled in, although by filling it in the owner might make a large sum out of it.

Ripley v. Great Northern R. W. Co., L. R. 10 Ch. 435; *Widder v. Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 425; and *Boom Co. v. Patterson*, 98 U. S. R. 403, followed.

4. That the whole sum allowed must be taken upon the face of the award to have been allowed as purchase money of the land taken.

James v. Ontario and Quebec R. W. Co., 12 O. R. 624, 15 A. R. 1, specially referred to.

5. That the land must from the date of the passing of the by-law be deemed to have been "taken" by the city corporation, and interest was payable from that date.

Rhys v. Dare Valley R. W. Co., L. R. 19 Eq. 93, and *Re Shaw and Corporation of Birmingham*, 27 Ch. D. 614, followed.

6. That the arbitrator had jurisdiction to award interest.

J. B. Clarke, Q.C., for the city corporation.

H. J. Scott, Q.C., and *H. C. Boulton*, for the land-owners.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 7TH JUNE, 1895.]

WESTERN BANK OF CANADA v. COURTEMANCHE.

Stay of proceedings—Motion to set aside judgment—Divisional Court.

When a motion to a Divisional Court to set aside the judgment pronounced at the trial, but not yet entered, has been set down for hearing, there is a stay of proceedings upon such judgment *ipso facto*, unless it should be otherwise ordered.

C. E. Hewson, for the plaintiffs.

D. O. Cameron, for the defendant Courtemanche.

[BOYD, C., 6TH JUNE, 1895.]

BROOKS v. GEORGIAN BAY SAW-LOG SALVAGE CO.

*Evidence—Foreign commission—Jurisdiction of referee—R. S. O. c. 44, s. 102
—Rules 34-37, 52, 58, 59, 73, 441, 442, 552, 590.*

A referee upon a reference under s. 102 of the Judicature Act, R. S. O. c. 44, has jurisdiction to order the examination of foreign witnesses under a commission; he is in the position of a judicial officer, and can, like the Master or trial Judge, regulate the proceedings and provide for the attendance of witnesses and the examination of those who are outside of the Province.

Rules 34-37, 52, 58, 59, 73, 552, considered.

Semble, the provisions of Rule 590 are embraced by inference in Rule 85 so as to enable the referee, by express terms, to grant certificates for the issue of foreign commissions.

But the mere form, whether by certificate or order, is immaterial, having regard to Rules 441, 442.

Hayward v. Mutual Reserve Association, [1891] 2 Q. B. 286, and *Macalpine v. Calder*, [1893] 1 Q. B. 545, followed.

Kilmer, for the plaintiff.

C. W. Kerr, for the defendants.

[STREET, J., 26TH NOVEMBER, 1894.]

CARROLL v. PROVINCIAL NATURAL GAS AND FUEL COMPANY OF ONTARIO.

Interim injunction—Duration of—"Final disposition of the action"—Judgment after trial—Stay of entry—Effect of.

Where an injunction is granted "until the trial or other final disposition of the action or until further order," it remains in force until the action is finally disposed of or until some other order is made with regard to the injunction. The action is not finally disposed of until final judgment is entered, because until then it cannot be certain what the final judgment will be. The pronouncing of judgment is not equivalent to the entry of judgment, although when entered the judgment takes effect from the date on which it was pronounced, unless otherwise ordered.

And where an interim injunction was obtained by the plaintiffs restraining the defendants from doing certain acts until the trial or other final disposition of the action or until further order, and by the judgment pronounced after the trial the action was dismissed, but the entry of the judgment was stayed until the fifth day of the next sittings of a Divisional Court :—

Held, that the effect of the stay was to leave the whole matter in *statu quo* until the defendants should become entitled to enter judgment, and by so doing to put an end to the injunction in accordance with its terms.

Aylesworth, Q.C., for the plaintiffs.

McCarthy, Q.C., for the defendants.

[12TH JUNE, 1895.]

MORGAN v. HUNT.

Life insurance—Foreign benevolent society—Policy—Conditions not on of—Rules of society—58 V. c. 32, s. 4—51 V. c. 32, s. 2—Beneficiaries—Right of society to limit to certain class—Substitution of others by will of insured.

Action by a widow against the executors and beneficiaries under her deceased husband's will, for a declaration that the plaintiff was entitled to the amount payable under a benefit policy upon the life of the deceased, issued by a benevolent society incorporated under the laws of the United States, with its head office in the State of Illinois, and not incorporated or registered under any Act of this Province.

At the time of the issuing of the policy the deceased was an unmarried man, and the benefits under it were made payable to his mother, who predeceased him, or his executors. By one of the by laws of the society it was provided that where the insured marries after the date of the policy, it *ipso facto* becomes payable to the widow, "unless otherwise ordered after date of such marriage." Under another by-law the policy could be made payable only to a wife, an affianced wife, a blood relation, or a person dependent on the assured, and was not to be willed or transferred to any other person. By his will the deceased purported to give to his widow the amount of this insurance and \$750 upon another insurance, subject, however, to the payment of his debts.

Held, that the policy was capable of being controlled by conditions not set out upon its face, because s. 4 of 52 V. c. 82 applies only to the companies to which R. S. O. c. 167 applies and as the insurance and the rights of the parties under it did not depend upon anything contained in R. S. O. c. 136, it was not necessary to consider whether it was brought within the scope of that Act by 51 V. c. 22, s. 2; and, therefore, the binding terms of the contract were to be found upon its face and in the rules of the society, which formed part of the contract.

Held, also, that under the terms upon which the society agreed to pay this money, the insured had no power to bequeath any part of it to his executors or his creditors, and the society had the right to say that their contract was to pay the money only within a certain class; that the insured had no right to substitute a beneficiary outside that class; and therefore the money belonged to the widow, free from the obligation to pay debts.

H. J. Scott, Q.C., and D. Robertson, for the plaintiff.

Aylesworth, Q.C., for the defendants.

IN CHAMBERS.

[BOYD, C., 4TH JUNE, 1895.]

OLIGNY v. BEAUCHEMIN.

Writ of summons—Service out of jurisdiction—Rules 271 (e), 1809—Malicious prosecution—Arrest in Ontario.

The plaintiff was arrested in Ontario under a warrant issued in the Province of Quebec, upon an information there laid, and was taken to Quebec, where he was ultimately discharged.

Held, that service of the writ of summons upon the defendants in Quebec in an action for malicious prosecution begun in Ontario could not be permitted under Rule 271 (e), as amended by Rule 1809.

The action was one and entire; apart from some contribution as to the total damage, all the matters required to be proved by the plaintiff were localized in Quebec; and proof of

some damage in Ontario, which was a continuation of the original tort, was not sufficient to attract the whole cause of action to Ontario.

F. C. Cooke, for the plaintiff.

F. A. Anglin, for the defendants.

[8TH JUNE, 1895.]

HOWLAND v. INSURANCE COMPANY OF NORTH AMERICA.

Writ of summons—Foreign corporation—Service on agents within jurisdiction—Foreign contract—Question of jurisdiction—Special appearance—Rule 286.

In an action by residents of Ontario upon a foreign contract of insurance against a foreign corporation, service of the writ of summons was effected upon local agents of the defendants in Ontario.

Upon motion to set aside the service or for leave to enter a special appearance :—

Held, that, although the service might be technically right, the question of jurisdiction was a grave one, and should be dealt with at a later stage.

Leave given to the defendants to appear conditionally or under protest, and then raise the defence of want of jurisdiction and other defences, as advised.

There is no obstacle in the present practice to either of these methods of appearance, Rule 286 being wide enough to cover all cases of appearance.

Arnoldi, Q.C., for the plaintiffs.

Ryckman, for the defendants.

[ROSE, J., 8TH MAY, 1895.]

BEGINA *ex rel.* THORNTON v. DEWAR.

Municipal elections—Bribery—Agents—Quo warranto—Consolidated Municipal Act, 1892, ss. 209-13.

Held, that no one can be found guilty of bribery under ss. 209-13 of the Consolidated Municipal Act, 1892, unless the evi-

dence discloses in him an intention to commit the offence. A candidate desiring and intending to have a pure election cannot be made a *quasi*-criminal by the act of an agent who, without the knowledge or desire of the principal, violates the statute to advance the election of such candidate.

W. Nesbitt and Sicklesteel, for the relator.

Aylesworth, Q.C., for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 8TH JUNE, 1895.]

NORTH-WEST COMMERCIAL TRAVELLERS' ASSOCIATION v. LONDON GUARANTEE AND ACCIDENT CO.

Insurance—Accident—Construction of policy—Death by freezing.

Appeal from decision of BAIN, J., *ante* p. 19.

Verdict for plaintiffs affirmed and appeal dismissed with costs.

Howell, Q.C., and *Mulock*, Q.C., for the plaintiffs.

Culver, Q.C., and *Cameron*, for the defendants.

MARTIN v. NORTHERN PACIFIC EXPRESS CO.

Common carriers—Receipt given by consignee, but no actual delivery proved—Loss of money package.

Appeal from decision of BAIN, J., *ante* p. 115.

Verdict for the plaintiffs affirmed and appeal dismissed with costs; KILLAM, J., dissenting.

The fourth condition of the contract in the receipt book provided that the company "shall not be liable for any claim . . . unless such claim is presented in writing within 60 days from the date of loss or damage in a statement to which a copy of this contract shall be annexed." The plaintiffs did

within 60 days serve upon the defendants a demand for the return of the \$2,000 which the defendants had received, but it had not, in accordance with the condition, a copy of the contract annexed.

Per KILLAM, J.—The condition was not fulfilled. For this reason the verdict should be set aside and a non-suit entered.

Ewart, Q.C., and Wilson, for the plaintiffs.

Howell, Q.C., and Machray, for the defendants.

[KILLAM, J., 6TH JUNE, 1895.]

ROGERS v. COMMERCIAL UNION ASSURANCE CO.

Arbitration and award—Evidence of expert called in by arbitrators and umpire—Application to set aside award.

On the trial of several interpleader issues directed to determine to whom should be paid any moneys owing by the defendant companies, the plaintiff sought to give evidence of the value of some of the goods included in the policies which had been destroyed. The defendants showed that the plaintiff had entered into a special agreement with all the companies for an arbitration to settle the amount of liability, if any. By this agreement two arbitrators were appointed, and an umpire, but the latter objected to act on account of want of knowledge of the goods—furs—destroyed, and an expert was called in, who made a valuation of the goods damaged, but not entirely burned, which valuation was approved and signed by the two arbitrators and the umpire. The companies' arbitrator and the umpire agreed upon an estimate as to the value of the goods which had been entirely destroyed, and an award was prepared and signed by the companies' arbitrator and the umpire, but the plaintiff's arbitrator would not sign it.

Held, that the award was binding, notwithstanding that an expert had been called in to determine upon valuations, and that the arbitrators and umpire had accepted his estimate; and that no evidence should be received to show that the plaintiff's loss was greater than the amount shown by the award.

Hagel, Q.C., and Elliott, for the plaintiff.

Mulock, Q.C., Munson, Q.C., Richards, and Bradshaw, for the several defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.]

[25TH JUNE, 1895.]

KEACHIE v. CITY OF TORONTO.

Municipal corporations—Damages—Ways.

A municipal corporation is not responsible in damages to a person who is injured in endeavouring to cross in daylight a plainly visible shallow trench, properly and necessarily in the street at the time, the person injured being moreover familiar with the locality and knowing that there is close at hand a safe passage-way across the trench.

Judgment of the Queen's Bench Division reversed.

J. B. Clarke, Q.C., for the appellants.

W. R. Riddell, for the respondent.

W. Nesbitt and *Tytler*, for the third party.

CANADA LANDED AND NATIONAL INVESTMENT CO.
v. SHAVER.*Mortgage—Covenant—Purchaser of equity of redemption.*

The purchaser of land subject to a mortgage does not *ipso facto* become personally liable to the mortgagee for the amount of the mortgage. In other words, the burden of a covenant to pay mortgage moneys does not run with the mortgaged lands.

Judgment of the Queen's Bench Division affirmed.

McCarthy, Q.C., and *A. Hoskin*, Q.C., for the appellants.

Moss, Q.C., and *F. E. Titus*, for the respondent.

EASTMURE v. CANADA ACCIDENT INSURANCE CO.*Master and servant—Rival employer—Clashing of interests—Dismissal*

To act as agent for a rival insurance company is a breach of an insurance agent's agreement "to fulfil conscientiously all the duties assigned to him and to act constantly for the best interests of (his employer)," and is sufficient justification for his dismissal.

Judgment of the Queen's Bench Division affirmed.

Osler, Q.C., for the appellants.

W. Cassels, Q.C., and *Bruce*, Q.C., for the respondents.

CLOUSE v. COLEMAN.

Discovery—Bodily injury—Examination by medical practitioner—54 V. c. 11—Questions—Leave to appeal.

Leave to appeal from the decision of the Queen's Bench Divisional Court, *ante* p. 208, was refused, this Court being of opinion that it was clearly right.

H. S. Osler, for the plaintiff.

Arnoldi, Q.C., for the defendant.

CH. D.]

CHURCH v. CITY OF OTTAWA.*Damages—Inadequacy of—Negligence—New trial.*

An appeal by the defendants from the judgment of the Chancery Division, 14 Occ. N. 480, 25 O. R. 298, was dismissed with costs, the Court, in view of the fact that a new trial had been ordered, not giving any reasons for judgment.

Aylesworth, Q.C., for the appellants.

W. R. Riddell and *H. E. Rose*, for the plaintiff.

G. E. Kidd, for the third party.

ADAMSON v. ROGERS.*Covenant—Lease—Improvements—"Buildings and erections"—Earth-filling*

A covenant by the lessor, in a lease of a parcel of land covered by water, to pay at the end of the term for "the buildings and

erections that shall or may then be on the demised premises," does not bind him to pay for crib-work and filling-in done upon the parcel in question by which it was raised to the level of the adjoining dry land and made available as a site for warehouses.

Judgment of the Chancery Division reversed.

Robinson, Q.C., and *J. H. Macdonald*, Q.C., for the appellant.

Laidlaw, Q.C., for the respondent.

C.P.D.]

In re CORNELIUS F. MURPHY.

Extradition—False document—Forgery—Evidence.

The prisoner's brother opened a bank account in an assumed name and made cheques from time to time thereon. Several of these cheques were paid, but the last one the prisoner cashed at his own bank, knowing that there were no funds to meet it:—

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A., that there was evidence from which it might reasonably be inferred that the opening of the account in the assumed name was part of a conspiracy between the prisoner and his brother to defraud, and that there was therefore the fraudulent uttering of a false document which would constitute forgery.

Per BURTON and OSLER, JJ.A., that, as the account was a genuine one, and there was no false representation as to the maker of the cheque, the offence of forgery was not made out.

Held, also, per HAGARTY, C.J.O., and MACLENNAN, J.A., that it is not necessary to show in extradition proceedings that the prisoner is liable to conviction of the crime charged according to the law of the demanding country.

Per BURTON and OSLER, JJ.A., that it must be shown that the prisoner is liable to conviction for the crime charged according to the law of both countries.

In the result the judgment of the Common Pleas Division, *ante* p. 154, 26 O. R. 163, was affirmed.

F. Fitzgerald, for the appellant.

Bruce, Q.C., for the private prosecutor.

In re McILMURRAY AND JENKINS.

Plans and surveys—Amendment of plan—Ways—Closing street—"Party concerned"—52 V. c. 20, s. 7.

All persons who buy lots according to a registered plan do not *ipso facto* become "parties concerned" within the meaning of s. 7 of the Land Titles Act, 52 V. c. 20, in every street shown upon it. Whether they are "concerned" or not in having a particular street kept open is a question of fact, and, in the absence of any representation by the vendor that the street shall be kept open, a person owning a lot about four hundred yards away and on the other side of a highway from the street in question, cannot object to its being closed.

Judgment of the Common Pleas Division affirmed.

J. Bicknell, for the appellants.

R. U. McPherson and *A. G. Murray*, for the respondents.

ARMOUR, C.J.]

DUNLOP v. USBORNE FIRE INSURANCE CO.

Fire insurance—Assignment of part of insured property—Breach of statutory conditions.

Where a policy of insurance covers buildings and chattels and the land upon which the buildings stand is conveyed by deed without the consent of the insurers, in breach of the fourth statutory condition, the policy is avoided *in toto* and does not remain in force as to the chattels.

Samo v. Gore District Fire Ins. Co., 2 S. C. R. 31, applied.

Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., and *W. C. Moscrip*, for the appellants.

Garrow, Q.C., for the respondents.

STREET, J.]

HENDERSON v. BANK OF HAMILTON.

Banks and banking—Special deposit—Action—Damages—Costs—Interest—Payment into Court.

An appeal by the defendants from the judgment of STREET, J., 14 Occ. N. 468, 25 O. R. 641.

The appeal was confined to the question of costs, the

appellants contending that as the total amount paid into Court by them was more than the plaintiff was entitled to, they should not have been ordered to pay costs.

The appeal was dismissed with costs, the majority of the Court holding that, having regard to the wording of the statement of defence, the moneys paid in must be dealt with as separate and distinct sums.

MACLENNAN, J.A., dissented.

J. J. Scott, for the appellants.

L. G. McCarthy, for the respondent.

C. C. YORK.]

ONTARIO INDUSTRIAL LOAN AND INVESTMENT CO.
v. O'DEA.

Landlord and tenant—Lease—Surrender.

Acts relied on as showing the acceptance by the landlord of the surrender of a lease and as effecting a surrender by operation of law must be such as are not consistent with the continuance of the term ; and accepting the key ; putting up a notice that the premises are " to let ; " and making some trifling repairs, are ambiguous acts which are not sufficient for this purpose.

Judgment of the County Court of York affirmed.

J. J. Warren, for the appellants.

H. A. E. Kent, for the respondents.

C. C. BRUCE.]

ROBERTSON v. BURRILL.

Statute of Limitations—Acknowledgment—Administration.

An acknowledgment of indebtedness by letter written after the creditor's decease to the person who is entitled to take out letters of administration and who does, after the receipt of the letter, take out letters of administration, is a sufficient acknowledgment within the Statute of Limitations.

Judgment of the County Court of Bruce affirmed ;
MACLENNAN, J.A., dissenting.

H. P. O'Connor, Q.C., for the appellant.

D. Robertson, for the respondent.

C. C. ELGIN.]

CITY OF ST. THOMAS v. YEARSLEY.

Duress—Bond.

A bond to secure the payment of the cost of maintaining at an industrial school a boy convicted of larceny, given in consequence of the magistrate's statement that in default the boy would be sent to the reformatory, is void, this being in law duress.

Judgment of the County Court of Elgin reversed ; HAGARTY, C.J.O., dissenting.

O. A. Howland and T. W. Crothers, for the appellants.

N. Macdonald, for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 13TH JUNE, 1895.]

WILLIAMS v. LEONARD.

Amendment—Rule 444—Hardship—Defence—Bills of Sale Act—Chattel mortgage—Description—Sufficiency.

Under Rule 444 an amendment should be allowed at any stage of the proceedings if it can be made without injustice to the other side ; and there is no injustice if the other side can be compensated by costs.

Steward v. North Metropolitan Tramways Co., 16 Q. B. D. 556, applied and followed, notwithstanding the difference in the English Rule.

And, *semble*, a matter of mere hardship should not govern the question of granting or refusing an amendment.

And where, in an action to recover possession of a chattel, the defendants, who were subsequent *bona fide* purchasers for value without notice of the plaintiff's purchase, were at the trial refused liberty to amend their defence by setting up the provisions of the Bills of Sales Act, which amendment would have called for no additional evidence, a Divisional Court allowed it upon appeal.

Judgment of ROSE, J., reversed.

A chattel mortgage purported to transfer the goods described in the schedule, all of which were upon the premises of the mortgagor in a city, described by street and lot. The schedule described certain machinery upon the premises and added, "all machines . . . in course of construction or which shall hereafter be in course of construction or completed . . . upon the premises . . . or which are now or shall be on any other premises in the said city." The machine in question was constructed upon premises other than those described in the mortgage, the mortgagors having removed their works after the mortgage was made.

Held, that it was not covered by the mortgage.

Horsfall v. Boisseau, 21 A. R. 663, distinguished.

Judgment of Rose, J., upon this point, affirmed.

McEvoy and *W. A. Wilson*, for the plaintiff.

Gibbons, Q.C., for the defendants.

[FERGUSON, J., 4TH MAY, 1895.]

PARKES v. TRUSTS CORPORATION OF ONTARIO.

Will—Executory devise — Vested estate subject to be divested—Event—Impossibility of happening.

A testator devised a farm to executors in trust for his grandson, with power to sell and apply the proceeds for his benefit; and if he died before attaining twenty-one, the executors were to transfer the land, or, if sold, the balance of the proceeds, to his father, the husband of a deceased daughter. The father died first, and the son died before attaining twenty-one, without issue, the land not having been sold.

Held, that the grandson took a vested estate in fee simple, subject to be divested on the happening of a certain event, and that, as the happening of that event had become impossible by reason of the father's death, his estate became absolute, and his representatives were entitled.

E. P. McNeill, for the executrix.

Biggar, Q.C., for the testator's surviving daughter.

Shepley, Q.C., for the defendant company.

COMMON PLEAS DIVISION.

[MEREDITH, C.J., AND ROSE, J., 29TH JUNE, 1895.]

REGINA v. HUGHES.

Justice of the peace—Jurisdiction—Trespass—Railway—Arrest—51 V. c. 29, s. 283.

Section 283 of the Railway Act of Canada, 51 V. c. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where the constable arrests an offender and takes him before the justice.

A summary conviction of the defendant by a justice for the county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested, but merely summoned.

DuVernet, for the defendant.

Aylesworth, Q.C., for the prosecutors.

[THE DIVISIONAL COURT, 29TH JUNE, 1895.]

PARKER v. McILWAIN.

Attachment of debt—Rents—Ex parte orders—Rescission of—Application of mortgagee—"Party affected"—Suggestion of claim—Concealment—Rules 536, 935, 940, 944—Notice to tenants.

The plaintiff, having an unsatisfied judgment against the defendant in the High Court, obtained from the Master in Chambers, *ex parte*, two orders, under Rules 935 and 940, attaching as debts due to the defendant certain rents owing by his tenants, the garnishees, and summoning them to appear before a County Court Judge to show cause why such rents should not be paid over to the plaintiff. Upon the application of a company, mortgagees of the demised premises, who had served notice upon the garnishees to pay the rent to them, the Master made an order rescinding the attaching orders.

Held, that if the garnishees, upon the return of the summons, neglected to suggest to the Court the claim of the company, as provided by Rule 944, they would not be protected by an order to pay to the plaintiff.

The Leader, L. R. 2 Ad. & Ec. 314, followed.

And, therefore, the company was not a "party affected" by the *ex parte* orders, within the meaning of Rule 536.

No fraud or imposition was practised upon the Court in not informing the Master of the claim which might be set up by the garnishees or the company; it was a matter for hearing and adjudication before the County Court Judge.

Quære, whether the company had the right to have the rents paid to them simply by virtue of the notice served upon the tenants.

Towerson v. Jackson, 65 L. T. N. S. 832, specially referred to.

B. N. Davis and *J. E. Cook*, for the plaintiff.

W. H. Lockhart Gordon, for the company.

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HANES v. BURNHAM.

Slander—Privileged occasion—Interest—Duty—Belief—Express malice—Burden of proof—Evidence—Notice of action—Public officer.

The plaintiff, the wife of a postmaster, complained of certain defamatory words spoken by the defendant, an assistant post office inspector, to the effect that she had taken money from letters, and had given him a written confession of her guilt.

Held, that as to statements made in the discharge of the defendant's official duty, to the plaintiff's husband as postmaster, and to two other persons as sureties for him, the occasions were privileged; but not so as to statements made to a partner of one of the sureties, who used the post office, and to whose business premises the defendant contemplated removing it; for the defendant and the partner had no such common interest in the matter as justified the communication, nor was there any public or moral or social duty resting on the defendant which justified him in making it. Even had the evidence shown that the defendant honestly believed that such a duty rested upon him, or that there was such a common interest, if such belief were unfounded, the occasion would not have been privileged.

2. Where the occasion is privileged, the plaintiff's case fails, unless there is evidence of malice in fact, and the burden of proving this is on the plaintiff, who must adduce evidence upon

which a jury might say that the defendant abused the occasion either by wilfully stating as true that which he knew to be untrue, or stating it in reckless disregard of whether it was true or false.

And where the plaintiff in her evidence denied that she had made a confession to the defendant, but admitted that after her denial the defendant continued to assert to her, and appeared to believe, that she had made one :—

Held, that there was evidence of malice in fact to go to the jury.

3. The defendant was not entitled to notice of action as a public officer; the statutes requiring such notice applying only to actions brought for acts done.

Royal Aquarium Society v. Parkinson, [1892] 1 Q. B. 431, followed.

Murray v. McSwiney, I. R. 9 C. L. 545, distinguished.

Semble, also, that the statutes requiring notice of action cannot be invoked where the words spoken are defamatory and have been uttered with express malice.

Lynch-Staunton and J. G. Farmer, for the plaintiff.

Ritchie, Q.C., and *F. E. Hodgins*, for the defendant.

VILLAGE OF LONDON WEST v. LONDON GUARANTEE AND ACCIDENT CO.

Insurance—Employee's guarantee contract—Renewal—Ontario Insurance Corporations Act, 1892, s. 33, s.-s. (2)—Condition—Misstatements—Materiality.

By a contract in writing, made in 1890, the defendants agreed to guarantee the plaintiffs against pecuniary loss by reason of fraud or dishonesty on the part of an employee during one year from the date of the contract, or during any year thereafter in respect of which the defendants should consent to accept the premium which was the consideration for the contract. The defendants accepted the premium in respect of each of the three following years, and gave receipts entitled "renewal receipts," in which the premiums were referred to as "renewal premiums."

Held, that the contract was a contract of insurance made or renewed after the commencement of the Ontario Insurance Corporations Act, 1892, within the meaning of s. 33; and, upon the true construction of s.-s. (2), could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of the contract providing for avoidance for such misstatements was not, in stated terms, limited to cases in which such misstatements were material to the contract.

E. R. Cameron, for the plaintiffs.

J. Pearson and W. R. Riddell, for the defendants.

[MEREDITH, C.J., 26TH JUNE, 1895.]

McLAREN v. WHITING.

Partnership—Receiver—Interim sale of assets.

Under special circumstances an order may be made, in an action for the dissolution and winding-up of a partnership, for the sale of the assets by the receiver before the trial.

And such an order was made where it was shewn that the partnership was insolvent; that the value of the assets would be lessened if they were not disposed of at once; that, as to most of them, the present was the most advantageous time for disposing of them; that the creditors were pressing and likely to take legal proceedings; and that mortgagees of some of the assets were proceeding to realize upon their securities.

R. B. Beaumont, for the plaintiff.

IN CHAMBERS.

[ROBERTSON, J., 18TH JUNE, 1895.]

In re CLARK AND PROVINCIAL PROVIDENT INSTITUTION.

Life insurance—Wives and children—Debt of assured to insurers—55 V. c. 39, s. 39.

An application by the institution for leave to pay into Court the sum of \$2,000, moneys arising from an insurance or benefit certificate upon the life of one Clark, deceased, a member of the

institution, less \$90.26, the amount of a note given by the insured in order to secure and stay the enforcement of a judgment against him on a debt due to the institution by the insured, not however for assessments on the policy. The moneys arising from the certificate were designated in favour of the wife and children of the assured.

F. E. Hodgins, for the applicants, relied on their by-law, No. 27, which provides that "any debt, dues, or demands contracted by a member, beneficiary, or beneficiaries, with the institution, shall be a charge upon or warrant suspension of his certificate."

F. W. Harcourt, for the official guardian, representing the infant children of the insured, relied on 55 V. c. 39, s. 39.

ROBERTSON, J.—I think it clear that the Provincial Provident Institution has no power to make a by-law which will do away with the effect of s. 39 of 55 V. c. 39; in fact, without that section, I think it contrary to the spirit of the Act to secure to wives and children the benefit of life assurance, R. S. O. c. 186, to authorize anything on the part of the assured which will subvert or interfere with the amount payable under the policy for the benefit of the wife and children; the moneys payable under the policy in question do not belong to the estate of the assured, the assured having predeceased the beneficiaries. If the assurers have the right to deduct this debt which the assured contracted with them—the \$90.26 note referred to—the assured could have incumbered the policy to the full amount thereof, thus frustrating the very object of the Act; to secure the amount to his wife and children. I therefore am of opinion that the institution must pay the whole amount secured by the policy into Court, with costs of official guardian to him.

[MEREDITH, J., 6TH DECEMBER, 1894.]

CROOKS v. TOWNSHIP OF ELLICE.

HILES v. TOWNSHIP OF ELLICE.

Costs—Taxation—Drainage actions—Appeal—Reference to Drainage Referee—Costs awarded on appeal.

Where actions begun in the High Court were referred at the trial to the Drainage Referee, and upon appeal from his report an

order was made by an appellate Court for taxation and payment of costs of the actions :—

Held, that they were not costs coming within the provisions of s. 24, s.-s. (4), of the Drainage Trials Act, 1891, but were to be taxed in the usual way in which costs of actions are taxed, and subject to the same right of appeal.

W. M. Douglas and J. P. Mabes, for the plaintiffs.

J. M. Clark and J. H. Moss, for the defendants.

[See *Fewster v. Township of Raleigh*, ante p. 137.]

MANITOBA.

In the Queen's Bench.

[DUBUC, J., 22ND JUNE, 1895.]

VIVIER v. VILLENEUVE.

*Real Property Act—Tax sale—Title by possession—Statute of Limitations—
Absence from Manitoba.*

Issue under the Real Property Act to determine the ownership of lot 59 of the parish of St. Francois Xavier. The plaintiff claimed by possession, and the defendants showed a complete paper title.

It appeared from the evidence that the plaintiff had been for over twenty-five years living with her family on the end of the lot fronting on the Assiniboine river, and cultivated a small garden near the house. For about a quarter of a mile from the river the lot was wooded, and the plaintiff had cut the wood for use at the house and for sale. On one occasion she permitted a man to cut hay on the outer two miles, and thus seemed to exercise some control over the whole of the lands.

The plaintiff claimed title by possession under the Real Property Limitation Act, R. S. M. c. 89, s. 4.

The lands were sold for arrears of taxes for 1890 and 1891, but in an issue under the Real Property Act the tax sale deed was declared invalid, and the grantee afterwards executed a quit-claim deed in favour of the defendants.

The defendants claimed that under s. 188 of the Assessment Act, R. S. M. c. 101, the tax sale deed executed by the municipality in favour of the purchaser in 1893 had the effect of vesting the lands absolutely in the grantee and of interrupting the period of statutory limitation by possession.

Held, that, as the deed was declared invalid, it could not have that effect. Admitting that the period during which the plaintiff occupied the lands had been quite sufficient under the statute to entitle her to claim title by possession, there was the further point urged by the defendants that they came within one of the exceptions and disabilities mentioned in s. 35 of the Act, viz., absence from Manitoba. One witness stated that the two defendants to whom he conveyed the lands lived in Montreal, and the secretary-treasurer of the municipality stated that the lands were assessed to the defendants as of Montreal.

Held, that the absence of the defendants from the Province was sufficiently shown to prevent the operation of the statute, and a verdict should be entered in favour of the defendants.

(The disability "absence from Manitoba" has been repealed by 57 V. c. 16, but that Act did not come into force until 1st January, 1895, and it is declared that it shall not affect any matter, suit, or proceeding pending in any Court or Land Titles office in the Province.)

Munson, Q.C., for the plaintiff.

Coutlee and Wade, for the defendants.

BERTRAND v. HOOKER.

Assignments and preferences—Assignment for benefit of creditors—Previous assignment of moneys within a month—Fraudulent preference—Pleading—Demurrer.

Demurrer to the plaintiff's second and third replications. The plaintiff, as assignee, under the Assignments Act, of the estate of Mitchell & Gestur, sued the defendant on the money counts, for goods sold and delivered, goods bargained and sold,

etc., by the firm of Mitchell & Gestur to the defendant, which moneys were on or about 11th October, 1894, assigned by James Gestur, surviving partner of the firm, to the plaintiff as assignee.

The second count was to the same effect, except that it was for goods sold and delivered, etc., to the defendant by James Gestur, as surviving partner of the firm of Mitchell & Gestur.

In his fourth plea to the first count of the declaration and in his eighth plea to the second count, the defendant averred that, before action, the moneys and choses in action claimed in the declaration, and before the alleged assignment thereof, were duly assigned in writing to S. Sigurdson and J. Sigurdson, trading as Sigurdson Bros.

In his second and third replications to the fourth and eighth pleas the plaintiff set out in words and figures the alleged assignment to Sigurdson Bros., which bore date 17th September, 1894, and alleged that at the time of such assignment Mitchell & Gestur and J. Gestur were indebted to a large number of creditors and were in insolvent circumstances; that the assignment to Sigurdson Bros. was made within one month previous to the assignment to the plaintiff; that the assignment was made and received with intent to give Sigurdson Bros. a preference over other creditors.

The defendant demurred to the replications on the ground that they were intended as a confession and avoidance of the fourth and eighth pleas, but that while confessing the pleas they did not allege any matters sufficient in law in avoidance of the same.

Held, that the replications were not proper answers to the fourth and eighth pleas of the defendant, and the demurrer should be allowed. The replication, while admitting the assignment to Sigurdson Bros., stated a sufficient ground of avoidance in alleging that it was made at a time when the assignor was in insolvent circumstances, with the intent of giving a preference to Sigurdson Bros. over his other creditors. But an objection was raised which appeared to be fatal to the replications; they would be perfectly good if the action were brought against Sigurdson Bros., or if they were parties to the cause. How could this Court declare that the assignment to them was void

when they were not before the Court to uphold the assignment and assert their rights under it? The assignment might, under the statute, be considered void as against the plaintiff or the creditors represented by him, but he should bring the proper action to have it so declared, to which action the Sigurdson Bros. would necessarily be parties.

Monkman, for the plaintiff.

Elliott, for the defendant.

NORTH-WEST TERRITORIES

In the Supreme Court.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

[SCOTT, J., 1ST JUNE, 1895.]

REGINA v. FLEMING.

Constitutional law—Liquor License Ordinance, 1891-92, ss. 68, 69—Intra vires—Permitting gambling on licensed premises—Summary conviction—Motion to quash—Sufficiency of evidence—Information.

Sections 68 and 69 of the Liquor License Ordinance, 1891-92, authorizing the imposition of a fine upon any person licensed under the Ordinance who permits gambling upon his premises, are *intra vires* of the Legislative Assembly of the North-West Territories.

Hodge v. The Queen, 9 App. Cas. 117, and *Regina v. Wason*, 17 A. R. 221, followed.

Upon a motion to quash a summary conviction for an offence against the Ordinance, the Court, by s. 117, is authorized to examine the evidence to see whether it is sufficient to support the conviction.

And a summary conviction of the defendant for unlawfully allowing gambling in the barroom of his hotel, "being a place where liquor may be sold," was quashed, where the information did not state that the premises were "licensed," and the evidence merely showed that the gambling took place in the barroom of the hotel, and that the defendant was the licensee.

Motion to quash the conviction of the defendant by two justices of the peace "for that he, being the keeper of the barroom of the Commercial Hotel at Maple Creek, in the said Territories, being a place where liquor may be sold, did, on or about the 19th November, 1894, unlawfully allow gambling in the said barroom of said hotel."

The evidence given before the justices was that of two constables, who swore that they saw gambling in the barroom in question ; that the defendant was engaged in it ; and that he was " the keeper, that is, the licensee of the barroom."

The motion to quash was made upon the following grounds, among others: (1) That ss. 68 and 69 of the Liquor License Ordinance, 1891-92, were *ultra vires* of the Legislative Assembly of the Territories. (2) That the evidence given before the justices was not sufficient to show an offence under s. 68. (3) That there was no evidence that the premises were licensed under the Ordinance referred to, or that the defendant was so licensed, or was the proprietor, owner, or keeper of premises so licensed."

Sections 68 and 69, so far as material, read as follows :

" 68. If any person licensed under this Ordinance permits gambling . . . on his premises . . . he shall (in addition to any other punishment provided by law) be liable to a penalty of not less than \$25 nor more than \$50, and in default of payment {to not less than one nor more than two months' imprisonment.

" 69. Every description of gaming, playing at cards, dice, or any game of chance . . . is hereby strictly forbidden and prohibited in any hotel or other licensed premises in the Territories, and any proprietor, owner, or keeper of any such place allowing any description of gaming as aforesaid therein . . . shall be liable to be fined"

P. McCarthy, Q.C., for the defendant.

McCaul, Q.C., from the magistrates and prosecutor.

SCOTT, J.—As to the first objection, I am of opinion that the sections referred to are within the powers of the Legislative Assembly.

Counsel for the applicant relied upon *Regina v. Keefe*, 1 N. W. T. Reps., part 3, p. 86. In that case the Court *en banc* held, following *Russell v. The Queen*, 7 App. Cas. 829, and *Regina v. Wason*, 17 A. R. 221, that s. 5 of c. 38 of the Revised Ordinances was *ultra vires* of the Legislative Assembly, because its real object and true nature and character was, in the interest of public morals, to create an offence, and not for the protection of private rights. That section is as follows:—

" 5. Every description of gaming and all playing of faro, cards,

dice, or other games of chance, with betting or wagers for, or stakes of money or other things of value, and all betting and wagering on any such games of chance is strictly forbidden in the Territories, and any person convicted before a justice of the peace, in a summary way, of playing at or allowing to be played at on his premises, or assisting or being engaged in any way in any description of gaming as aforesaid, shall be liable to a fine," etc., etc.

In *Hodge v. The Queen*, 9 App. Cas. 117, it was held that the Ontario Liquor License Act, 1877, which provides for the establishment of licensing boards for the Province, and gives power to such boards, among other things, to regulate taverns and shops to be licensed thereunder and impose penalties for the breach of such regulations, and also provides for the imposition of punishment by fine and imprisonment for breaches of such regulations, was within the powers of the provincial legislature.

Sir Barnes Peacock, who delivered the judgment of the Court in that case, says at p. 180:—"It" (the Act) "authorizes the appointment of license commissioners to act in each municipality, and empowers them to pass, under the name of resolutions, what we know as by-laws, or rules to define the conditions and qualifications requisite for obtaining tavern or shop licenses . . . within the municipality; for limiting the number of licenses . . . for regulating taverns and shops . . . and to impose penalties for infraction of their resolutions. These seem to be all matters of a merely local nature in the Province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments. Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct."

In *Russell v. The Queen*, 7 App. Cas. 829, it is laid down, (pp. 839-840) that "the true nature and character of the legislation in the particular instance under discussion must

always be determined, in order to ascertain the class of subject to which it really belongs."

In my opinion, the true nature and character of ss. 68 and 69 is merely that of a regulation as to the manner in which premises licensed under the Ordinance shall be conducted. I think there can be no doubt as to the right of the Assembly to so regulate, and if it held the view that gambling in such premises was objectionable, I see no reason why it could not prohibit it in such premises and impose a penalty for permitting it, even though it had no power to prohibit gambling generally.

There is, to my mind, a clear distinction between the nature of the legislation in question in *Regina v. Keefe* and that in question here. To adapt the language of Mr. Justice Street in *Regina v. Wason*, 17 O. R. at p. 64, "The former was an Ordinance constituting a new crime for the purpose of punishing that crime, in the interest of public morality, and the latter is an Ordinance for the regulation of licensed premises."

Following *Hodge v. The Queen* and *Regina v. Wason*, I hold that ss. 68 and 69 of the Liquor License Ordinance, 1891-92, are *intra vires* of the Assembly.

As to the second and third objections :

It was urged by counsel for the justices that I should not refer to the evidence for the purpose of ascertaining whether it was sufficient to sustain the conviction until it was shown that the justices had no jurisdiction to enter upon the inquiry. He relied upon *Regina v. Bolton*, 1 Q. B. 66; *Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417; and *Regina v. Wallace*, 4 O. R. 127.

In my view, s. 117 of the Ordinance in question and s.-s. 1 thereof, in effect, require me to dispose of this application on the merits and to examine the evidence for the purpose of ascertaining whether it is sufficient to support the conviction. I do not well see how I could dispose of the application on the merits unless I examined the evidence to ascertain what the merits were.

As to the question of the sufficiency of the evidence, counsel for the defendant called my attention to s. 108 of the Ordinance in question, which provides that the description of any offence under the Ordinance in the words of the Ordinance, or in words of like effect, shall be sufficient in law, and that any exception,

exemption, provision, excuse, or qualification, whether it does or does not accompany the description of the offence in the Ordinance, may be proved by the defendant, but need not be specified or negatived in the information; but if it be so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant, and that the forms given in schedule K shall be sufficient in the cases therein provided for.

The appropriate form of information in schedule K is as follows:—

“That X. Y., being the keeper of (house of public entertainment) situate in the town of _____ in the District of _____ on _____ in his said hotel, unlawfully did sanction (or allow) gambling (or riotous or disorderly conduct) in his said hotel.”

The information against the defendant is as follows:

“That James Fleming, being keeper of the bar of the Commercial Hotel at Maple Creek, in the said Territories, being a place where liquor may be sold, did, on or about the 19th November, 1894, unlawfully allow gambling in the said barroom of said hotel.”

Sections 68 and 69 apply only to gambling in licensed premises. By s. 2, s.-s. 9, of the Ordinance the words “licensed premises,” where used therein, shall be construed and shall mean the premises in respect of which a license under the Ordinance has been granted and is in force, and shall extend to every room thereof.

Now, a premises may be styled a hotel, and there may be a barroom in it, and liquor may, under certain circumstances, be lawfully sold in it. In my view, therefore, the fact of the premises being licensed under the Ordinance was not specified in the information in such manner as to dispense with proof of that fact by the prosecution. The form of information in schedule K does not specify that fact, but merely leaves it open to the prosecutor to specify it therein, if so advised.

The only evidence as to the fact of the premises being licensed under the Ordinance was that the gambling took place in the barroom of the Commercial Hotel, and that the defendant was the keeper, that is, the licensee, of the barroom.

Apart from any question whether the fact of a license having issued under the Ordinance can be proved by oral testimony, I think it should not necessarily be inferred from the evidence that such a license had issued for the premises in question. In my

opinion, I should not, as against the defendant, place other than a literal construction upon the evidence. Even if I were bound to assume that the premises were licensed, owing to the fact that the defendant is shown to be the licensee thereof, I think I should not assume that they were licensed under the Ordinance in question.

A hotel may be licensed otherwise than under that Ordinance, as, for instance, under the Municipal Ordinance, s. 68, s.-s. 84, and there is nothing to show that the license referred to in the evidence was not a municipal license merely. It may be that Maple Creek is not within the limits of a municipality erected under the latter Ordinance, but I cannot take judicial notice of that fact.

In my view, there is not sufficient evidence to support the conviction.

I therefore order that the conviction be quashed without costs.

IN CHAMBERS.

[SCOTT, J., 27TH JUNE, 1895.]

REGINA v. WARREN.

Criminal procedure—Trial—Venue—Change of—Criminal Code, s. 651.

The affidavits in this case showed that a number of masked and armed men, of whom it was alleged the prisoner was one, broke into a dwelling-house at night and dragged out one of the occupants, whom they proceeded to "tar and feather."

The prisoner, charged with burglary, had been committed for trial to the custody of the North-West Mounted Police at Lethbridge, Southern Alberta Judicial District, where the alleged offence had been committed, and where sittings of the Court, in the nature of assizes, are regularly held.

The Crown applied to set the case down for trial at Macleod, thirty miles distant, but in the same judicial district, filing affidavits showing a strong feeling in favour of the prisoner, and in approbation of the alleged outrage, as existing in Lethbridge and the neighbourhood; and, in effect, that it would be impossible to get an impartial jury there.

Affidavits filed for the prisoner only denied these allegations to the extent of alleging "that not only could one, two, or three juries be selected, but more, who would justly try the question," etc. It appeared that there were about three hundred qualified jurors in and about Lethbridge. The prisoner's affidavits, showing

that the balance of convenience and expense was strongly in favour of Lethbridge, were practically uncontradicted.

McCaul, Q.C., for the Crown. It is not necessary to regard this as an application to change the venue. The judicial districts of the North-West Territories, presided over each by a sheriff, are the equivalents of the English "counties." The Crown can charge the prisoner at any place in the district, which is the "venue." The Crown prosecutor* is really applying for directions to the Judge, and notice to the prisoner is a mere matter of courtesy. But even under s. 651 of the Code, a strong case has been made for a change of venue.

Gallier, for the prisoner. Lethbridge is the "special venue," and the natural place of trial. In addition to expense and inconvenience, the prisoner would be prejudiced by a trial elsewhere.

Scott, J.—It is established by evidence, practically uncontradicted, that there is a strong probability of partiality and prejudice at Lethbridge. This would appear to be sufficient ground for a change of venue. But I do not regard this motion as an application for change of venue at all. If the Crown prosecutor had chosen, he might have arranged to have the prisoner arraigned and charged at any place where the Court may sit in the judicial district, subject, of course, to the prisoner's correlative right to move for a change of the place of trial. Had the prisoner in this case, for instance, been arraigned at Macleod, affidavits filed on his behalf showing a strong preponderance of convenience and expense in favour of Lethbridge would have established a *prima facie* case for a change of the place of trial; still, had the Crown in answer to such case filed the material that the Crown prosecutor has filed on this motion, I could not have granted a change of the place of trial, although, under ordinary circumstances, Lethbridge would be the natural place of trial for the prisoner. I direct, therefore, that the prisoner be arraigned and tried at Macleod.

As I make this direction independently of s. 651 of the Code, I do not think I have any power to impose terms; but the question of any additional expenses occasioned to the prisoner may be mentioned to the trial Judge.

*As the statutes provide that there shall be no grand jury in the Territories, its functions are practically performed by the Crown prosecutor, who peruses the depositions, etc., taken on preliminary examinations, and, if necessary, makes personal inquiries in addition for this purpose.

Supreme Court of Canada.

ONTARIO.]

[11TH MARCH, 1895.]

YORK v. TOWNSHIP OF OSGOODE.

*Waters and watercourses—Ditches and Watercourses Act, R. S. O. c. 220—
“Owner”—Tenant at will—Person instituting proceedings.*

By s. 6 (a) of the Ditches and Watercourses Act, R. S. O. c. 220, any owner of land to be benefited thereby may file a requisition with the clerk of a municipality for a drain, provided he has obtained “the assent in writing thereto of (including himself) a majority of the owners affected or interested.” C., who was in occupation of land by permission of his father, who had the legal title thereto, filed a requisition for a drain through such land and a number of other lots, among them being lots of which Y. was assessed as owner. Before the proceedings were begun by C., however, Y. had conveyed portions of his land to his two sons. Permission for the drain having been granted and an award having been made by an engineer and confirmed by the County Court Judge, Y. and his sons brought an action to have the construction of the drain prohibited, on the ground that the assent of a majority of owners had not been obtained. It was admitted that if C. was an owner under the Act, and the sons of Y. were not, there was a majority.

Held, affirming the decision of the Court of Appeal, 14 Occ. N. 246, 21 A. R. 168, that the assessment roll was not the test of ownership under the statute; that an owner therein meant the holder of a real and substantial interest; that C., a mere tenant at will, was not an owner; but the two sons of Y., having the title in fee of a part of the land affected or interested, were owners.

Quære :—Would the proceedings have been valid if there had been a sufficient majority without C., or must the person instituting the proceedings be, in all cases, an owner under the statute?

G. F. Henderson, and *J. J. MacCraken*, for the appellants.

O’Gara, Q.C., and *MacTavish*, Q.C., for the respondents.

TOOTH v. KITTREDGE.

Statute of Limitations—Partnership dealings—Laches and acquiescence—Interest in partnership lands.

A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands, the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands and to take an account of the dealings between J. and K. In the Master's office K. claimed that, in the course of the partnership business, he signed notes which J. indorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he claimed a large sum of money to be due him from J. for such overcharge. The Master held that, as these transactions had taken place nearly twenty years before, K. was precluded by the Statute of Limitations and by laches and acquiescence from setting up such claim. The Master's decision was reversed by a Judge in Court, and the decision of the latter affirmed by the Court of Appeal, on the ground that, the matter being one between partners and the partnership affairs never having been formally wound up, the statute did not apply.

Held, reversing the decision of the Court of Appeal and restoring the Master's report, that K.'s claim could not be entertained; that there was, if not absolute evidence, at least a presumption of acquiescence from the long delay; and that such presumption should not be rebutted by the evidence of the two partners, considering their relationship and the apparent covenant between them.

Gibbons, Q.C., for the appellant.

M. D. Fraser, for the respondent.

WEALLEANS v. CANADA SOUTHERN R. W. CO.

Railway company—Lease of road to foreign company—Statutory authority—Delegation of powers—Negligence—Fire.

In 1882 the Canada Southern Railway Company, by written agreement, leased a portion of its road to the Michigan Central Railway Company for a term of twenty-one years. While the latter company was using the road, sparks from an engine set fire to and destroyed property of W., who brought an action

against the two companies for the value of the property so destroyed. An insurance company who had paid the amount of a policy held by W. on the property so destroyed was joined as a plaintiff. At the trial the plaintiffs were nonsuited as against both defendants, it being admitted that the fire was not caused by negligence, and the Queen's Bench Divisional Court sustained such nonsuit, holding also that the insurance company had no *locus standi*. The Court of Appeal dismissed a further appeal by the insurance company and W. as against the Canada Southern Railway Company, but allowed W.'s appeal as against the Michigan Central Railway Company, holding that the Canada Southern Railway Company had statutory authority to make traffic arrangements only with a foreign company, and could not give the latter running powers over its road. The Michigan Central Railway Company then appealed to this Court.

Held, reversing the decision of the Court of Appeal, 14 Occ. N. 246, 21 A. R. 297, that under 85 V. c. 48, s. 9, an Act relating to the Canada Southern Railway Company, and s. 60 of the Railway Act of 1879, the Canada Southern Railway Company could lawfully lease its road to a foreign company, and the injury to W.'s property having occurred without any negligence on the part of the officers or servants of the Michigan Central Railway Company, which was lawfully in possession of the road of the Canada Southern Railway Company under the agreement, the Michigan Central Railway Company was not liable for such injury.

D. W. Saunders, for the appellants.

Moss, Q.C., for the respondent.

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DEROCHIE v. TOWN OF CORNWALL.

Municipal corporation—Negligence—Highway—Repair—Accumulation of ice—Defective sidewalk.

J. in an action for damages against a municipal corporation for injuries sustained by the plaintiff by falling on a sidewalk where ice had formed and been allowed to remain for a length of time :—

Held, Gwynne, J., dissenting, affirming the judgment of the Court of Appeal, 14 Occ. N. 247, 21 A. R. 279, that, as the

evidence at the trial showed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it, whereby the ice causing the accident was formed, the corporation was liable.

Per TASCHEREAU, J.—Allowing the ice to form and remain on the street was a breach of the statutory duty to keep the streets in repair, for which the corporation was liable.

McCarthy, Q.C., and *Leitch*, Q.C., for the appellants.

Moss, Q.C., for the respondent.

HEADFORD v. McCLARY MANUFACTURING CO.

Master and servant—Workmen's Compensation for Injuries Act, R. S. O. c. 141—Way—Defect—Hoist—Negligence—Workman in factory—Evidence—Nonsuit—Interference with on appeal.

W., a workman in a factory, to get to the room where he worked, had to pass through a narrow passage, and at a certain point to turn to the left, while the passage was continued in a straight line to a lift. In going to his work at an early hour one morning, he inadvertently walked straight along the passage and fell into the well of the lift, which was undergoing repairs. Workmen engaged in making such repairs were present at the time, with one of whom W. collided at the opening, but a bar that was usually placed across the front of the shaft was down. In an action against his employers in consequence of such accident:—

Held, affirming the decision of the Court of Appeal, 14 Occ. N. 247, 21 A. R. 164, STRONG, C.J., *hesitante*, that there was no evidence of negligence of the defendants to which the accident could be attributed, and W. was properly nonsuited at the trial.

Per STRONG, C.J. Though the case might properly have been left to the jury, as the judgment of nonsuit was affirmed by two Courts, it should not be interfered with.

Gibbons, Q.C., for the appellant.

W. Nesbitt, and *Monro Grier*, for the respondents.

NOVA SCOTIA.]

[15TH JANUARY, 1895.]

WRAYTON v. NAYLOR.

Sale of land—Sale by auction—Agreement as to title—Breach of—Determination of contract.

W. bought property at auction, signing a memorandum by which he agreed to pay ten per cent. of the price down, and the balance on delivery of the deed. The auctioneer's receipt for the ten per cent. so paid stated that the sale was on the understanding that a good title in fee simple, clear of all incumbrances up to the first of the ensuing month, was to be given to W. After the date so specified, W., not having been tendered a deed which he would accept, caused the vendor to be notified that he considered the sale off and demanded re-payment of his deposit; in reply to which the vendor wrote that all the auctioneer had been instructed to sell was an equity of redemption in the property; that W. was aware that there was a mortgage on it, and had made arrangements to assume it; that a deed of equity of redemption had been tendered to W., and that he was required to complete his purchase. In an action against the vendor and auctioneer for recovery of the amount deposited by W :—

Held, reversing the decision of the Supreme Court of Nova Scotia, 26 N. S. Reps. 472, that the vendor had repudiated the agreement evidenced by the memorandum signed by W. and the receipt; and that W., being entitled to a conveyance in fee, clear of incumbrances, was not bound to accept the equity of redemption, but could consider the contract determined and recover his deposit.

Harris, Q.C., for the appellant.

Borden, Q.C., for the respondents.

MURDOCH v. WEST.

Contract—Specific performance—Agreement to perform services—Relationship of parties.

M., at the age of three, on his father's death, went to live with his grandfather, W., who sent him to school until he was sixteen years old, and then took him into his store, where he

continued as the sole clerk for eight or nine years, when W. died. M. died a few days later. Both having died intestate, the administratrix of M.'s. estate brought an action against the representatives of W. for the value of the services rendered by M., and on the trial there was evidence of statements made by W. during the time of such service to the effect that if he, W., died without having made a will, M. would have good wages, and if he made a will he would leave the business and some other property to M.

Held, reversing the decision of the Supreme Court of Nova Scotia, 125 N. S. Reps. 172, Gwynne, J., dissenting, that there was sufficient evidence of an agreement between M. and W. that the services of the latter were not to be gratuitous, but were to be remunerated by payment of wages, or a gift by will, to overcome the presumption to the contrary arising from the fact that W. stood *in loco parentis* towards M. There having been no gift by will, the estate of W. was therefore liable for the value of the services as estimated by the jury.

McGugan v. Smith, 21 S. C. R. 263, followed.

Ross, Q.C., for the appellant.

Borden, Q.C., for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 27TH MAY, 1895.]

In re McFARLANE AND MILLER.

Prohibition—Appeal—Time—Ditches and Watercourses Act, 57 V. c. 55, s. 22, s.-s. 6—*R. S. O. c. 220, s. 11, s.-s. 5.*

On an application for prohibition to restrain proceedings on an appeal under the Ditches and Watercourses Act, 57 V. c. 55, on the ground that the appeal had not been heard and determined within two months under the provisions of s. 22, s.-s. 6:—

Held, that the provisions of that sub-section are merely directory and not imperative.

Held, also, that there is no sufficient declaration in that statute of an intention to change the law from what it was apart from the declaration in R. S. O. c. 220, s. 11, s.-s. 5, and prohibition was refused.

Decision of ROBERTSON, J., affirmed.

F. R. Ball, Q.C., for the appeal.

A. Bicknell, contra.

[BOYD, C., 2ND JULY, 1895.]

JOHNSON v. ALLEN.

Elections—Ontario Election Act, 55 V. c. 3, s. 186—Deputy returning officer—“Wilful” misfeasance—Penalty.

In an action against a deputy returning officer by a “person aggrieved,” to recover a penalty under s. 186 of the Ontario Election Act, 55 V. c. 3, for an alleged wilful refusal to allow the plaintiff to vote:—

Held, that the word “wilful” in the section means “perverse” or “malicious”; and, although the plaintiff was deprived of his vote by the refusal of the defendant to allow him to deposit a “straight” ballot, and there was thereby a contravention of the Act, yet, as the defendant honestly believed the plaintiff was not qualified and believed in his own power to withhold the ballot, the action failed.

Lewis v. Great Western R. W. Co., 8 Q. B. D. 195, followed.

Walton v. Ap John, 5 O. R. 65, distinguished.

F. H. Keefer, for the plaintiff.

Watson, Q.C., and *Ware*, for the defendant.

[MEREDITH, C.J., AND ROSE, J., 13TH JULY, 1895.]

REGINA v. STEELE.

Justice of the peace—Summary conviction—Interest—Bias—Relationship to complainant—Costs.

Where the convicting justice was the son of the complainant, and the latter was entitled to one-half of the penalty imposed, a summary conviction was quashed, on the ground that the justice

had such an interest as made the existence of real bias likely, or gave ground for a reasonable apprehension of bias, although there was no conflict of testimony.

The Queen v. Huggins, [1895] 1 Q. B. 563, followed.

Dictum of Rose, J., in *Regina v. Langford*, 15 O. R. 42, approved.

Costs of quashing conviction withheld from successful defendant, where he filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts.

R. D. Gunn, for the defendant.

F. E. Hodgins, contra.

IN CHAMBERS.

[Boyd, C., 8TH JUNE, 1895.]

In re HOBSON v. SHANNON.

Divisional Court—Garnishee proceedings—Judgment against garnishee—Motion for new trial after fourteen days—R. S. O. c. 51, ss. 173, 199.

Where a garnishee, more than two months after judgment obtained against him, was notified for the first time that the debt due from him to the primary debtor had been assigned by the latter to a third party prior to the garnishee proceedings:—

Held, that the Judge in the Division Court, upon motion for a new trial, had jurisdiction to open up the matter for further investigation, although after the lapse of fourteen days.

Raney, for the primary creditor.

W. C. Chisholm, for the garnishee.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 8RD JULY, 1895.]

FLACK v. JEFFREY.

Mechanics' Liens—Unpaid vendor—Liens subject to claim of.

In August, 1894, the defendant Fisher, the owner of a parcel of land, entered into a verbal agreement for the sale of it to the defendant Jeffrey for \$6,000, of which Jeffrey paid \$10 on

account, receiving a receipt for that amount, and was to pay the balance in a month or six weeks; he immediately went into possession, subdivided the land, and made arrangements for building three houses. The plaintiffs agreed to do the carpenter work upon one of the houses for \$275, the necessary material being supplied by Jeffrey. After some of the work had been done, Jeffrey showed the plaintiffs a notice, which he said he had received from Fisher, demanding payment of the purchase money, and they then stopped work. Up to this time Jeffrey had paid them nothing, and on 23rd October they registered a mechanic's lien for \$238, as the value of the work done by them, against the lots on which they claimed the house on which they did the work stood. After Fisher had served upon Jeffrey a demand for the payment of the purchase money, negotiations were entered into, and Fisher paid Jeffrey \$50 to get rid of him, taking a release of any claim he might have on the land. Two other men did work on the house and registered liens, which were assigned to the plaintiffs, and the bill was filed to enforce both liens.

The question was whether, under s. 2 (c) of the Mechanics' Lien Act, R. S. M. c. 97, Fisher was an owner of the land against whom these liens were charges. The plaintiffs contended that on the purchase by Jeffrey he became owner of the land in equity, and the liens having been registered before the execution of the release, Fisher stood in the position of a person claiming under him, whose rights had been acquired subject to the liens. It was further sought to make Fisher liable as a person with whose privity and consent, or for whose direct benefit, the work was done.

Held, following *Blight v. Ray*, 23 O. R. 415, that the plaintiffs were entitled to a lien on any estate or interest which the defendant Jeffrey had before he released to Fisher, but a decree in their favour could only be such as that which *Boyd, C.* was prepared to make in *Graham v. Williams*, 8 O. R. 479; 9 O. R. 458.

If the plaintiffs were willing to take a decree subordinating their liens to Fisher's claim as vendor, they could do so. If not, the bill must be dismissed against him. In either case Fisher would be entitled to his costs.

Elliott, for the plaintiffs.

Munson, Q.C., for the defendant Fisher.

[DUBUC, J., 4TH JULY, 1895.]

BERTRAND v. MAGNUSSON.

Execution—Homestead exemption—R. S. M. c. 53, s. 43 (k)—Sub-division of dwelling-house.

By deed dated 27th August, 1894, the defendant made an assignment to the plaintiff for the benefit of his creditors; the defendant at the time was the owner of a lot of land with a building thereon, the lower storey of which was a store, fronting on the street, with large windows, and a sign over the door. The upper storey was divided into six rooms, four of which were occupied by the defendant as a dwelling, the other two being rented; there was in the rear a lean-to, used as a summer kitchen, and another, used as a woodshed. The defendant had also a stable built on the back portion of the lot. The lot and building were valued at from \$1,000 to \$1,400.

The plaintiff contended that the lot and buildings passed to him by the deed of assignment, and brought an action of ejectment to recover the same. The defendant contended that his property was his actual residence and home, and exempt from seizure under execution under R. S. M. c. 53, s. 43, s.-s. (k), and that the property did not pass by the assignment.

Held, that a verdict should be entered for the defendant. It seemed reasonable that, as long as the building occupied by a debtor as his residence and home did not, including the land on which it was erected, exceed the value of \$1,500 fixed by statute, such person should be entitled to the protection afforded by the statute, although a portion of the building, even a substantial one, was used as an office, shop, store, or other place of business.

Elliott, for the plaintiff.

Haggart, Q.C., for the defendant.

Supreme Court of Canada.

ONTARIO.]

[6TH MAY, 1895.

SCOTTEN v. BARTHEL.

Deed—Description—Evidence—Patent ambiguity—Res magis valeat quam pereat—Verba fortius accipiuntur contra proferentem—Intention of parties.

Land was conveyed by the following description :—" All that certain tract or parcel of land situate, etc., being part of lot 48 . . . commencing in the southerly limit of said lot 48, at a distance of 20 feet from the water's edge of the Detroit river, thence northerly parallel to the water's edge 208 feet, thence westerly parallel to the said southerly limit 600 feet more or less to the channel bank of the Detroit river, thence southerly following the channel bank 208 feet, thence easterly 600 feet more or less to the place of beginning." In an action of ejectment for land alleged to be covered by this description, in which the point of commencement was difficult to ascertain :—

Held, reversing the decision of the Court of Appeal, 21 A. R. 569, 14 Occ. N. 491, KING, J., dissenting, that the construction of the description did not depend upon the terms of the patent of lot 48; that it must be construed by the terms of the instrument alone, read in the light of surrounding circumstances tending to explain it, even if such construction should make the grantor purport to convey more than he had title to; that the maxim *res magis valeat quam pereat* does not authorize a construction contrary to the plain intention of the parties; and that the maxim *verba fortius accipiuntur contra proferentem* cannot be applied to explain away a patent ambiguity.

E. D. Armour, Q.C., for the appellants.

McCarthy, Q.C., and *Wallace Nesbitt*, for the respondent.

EVANS v. KING.

Will—Construction—Devise for life—Remainder to issue “to hold in fee simple”—Shelley's case—Intention of testator.

A testator by the third clause of his will devised lands “to my son James for the full term of his natural life, and from and after his decease, to the lawful issue of my said son James to hold in fee simple.” The will then provided that in default of issue the lands should go to a daughter for life, with a like reversion to issue, failing which to brothers and sisters and their heirs. A later clause was as follows:—“It is my intention that upon the decease of either of my said children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of this my will.”

Held, affirming the decision of the Court of Appeal, 21 A. R. 519, 14 Occ. N. 369, that if the limitation had been to the heirs general of the issue, the son James would have taken an estate tail according to the rule in Shelley's case; that the word “issue,” though *prima facie* a word of limitation and equivalent to “heirs of the body,” is a more flexible term than the latter and more readily diverted, by force of the context or superadded limitations, from its *prima facie* meaning; that the expression “to hold in fee simple” is one of known legal import, admitting of no secondary or alternative meaning, and must prevail over the fluctuating word “issue;” and that effect must be given to the manifest intention of the testator that the issue were to take a fee.

E. D. Armour, Q.C., and McBrayne, for the appellants.

J. W. Nesbitt, Q.C., and J. Bicknell, for the respondents.

QUEBEC.]

ROLLAND v. LA CAISSE D'ECONOMIE DE NOTRE-DAME DE QUEBEC.

Banks and banking—Loan by savings bank—Pledge of securities as collateral—Letters of credit—Validity of loan—Obligation to repay—Nullity—Public order—Arts. 989, 990, C. C.—R. S. C. c. 122, s. 20.

L. borrowed a sum of money from La Caisse d'Economie, a savings bank in Quebec, giving as collateral security letters of

credit on the Government of Quebec. L. having become insolvent, the bank filed a claim with the curator of his estate for the amount lent and interest, which claim the curator contested on the ground that the bank was not authorized to lend money on the security of letters of credit, which were not securities of the kind mentioned in s. 20 of the Savings Banks Act, R. S. C. c. 122, and the loan was, therefore, null; and that it was a radical nullity, being contrary to public order, and the repayment could not be enforced: Arts. 989, 990, C. C. The Superior Court dismissed the contestation, but its judgment was varied by the Court of Queen's Bench, which held that the bank could not recover interest on the loan.

Held, affirming the decision of the Court of Queen's Bench, Q. R. 3 Q. B. 315, that, assuming the loan to have been *ultra vires*, the borrower could not avail himself of its invalidity to repudiate his obligation to pay his debt, nor could his creditors; that a contract of loan and one of pledge are so far independent that the one may stand and the other fall; and that the contestation was rightly dismissed.

Held, also, on cross-appeal, reversing the decision of the Court of Queen's Bench, that the bank was entitled to interest on its claim, as well as to the principal money.

Drouin, Q.C., for the creditors, appellants.

Langelier, Q.C., and *Fitzpatrick*, Q.C., for La Caisse d'Economie, respondents.

BAKER v. McLELLAND.

Deed—Construction—Sale of phosphate mining rights—Option to purchase other minerals found while working—Transfer of rights—Ambiguity.

M. by deed sold to W. the phosphate mining rights in certain land, the deed containing a provision that "in case the said purchaser in working the said mines shall find other minerals of any kind whatever, he shall have the privilege of buying the same from the said vendor or representatives, by paying the price set upon the same by two arbitrators appointed by the parties." W. worked the phosphate mines for five years, and then discontinued. Two years later he sold his mining rights in the land, which, by various conveyances, were finally transferred to

B., each assignment purporting to convey "all mines, minerals, and mining rights already found, or which may hereafter be found," on said land. A year after the transfer to B., the original vendor granted the exclusive right to work mines and veins of mica on the land to W. & Co., who proceeded to develop the mica. B. then claimed an option, under the original agreement, to purchase the mica mines, and demanded an arbitration to fix the price, which was refused, and she brought an action against M. and W. & Co. to compel them to appoint an arbitrator and for damages.

Held, affirming the decision of the Court of Queen's Bench, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica, as to which B. claimed it.

Held, also, that any ambiguity in the agreement granting the option must be interpreted against the purchaser.

McDougall, Q.C., for the appellants.

Aylon, for the respondents.

NOVA SCOTIA.]

[11TH MARCH, 1895.]

CUMMINGS v. McDONALD.

Chattel mortgage—Preference—Hindering and delaying creditors—Statute of Elizabeth—Assignment for benefit of creditors.

In an assignment for benefit of creditors, one preferred creditor was to receive nearly \$300 more than was due him from the assignor, on an understanding that he would pay certain debts due from the assignor to other persons, amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to nor named in the deed of assignment.

Held, reversing the decision of the Supreme Court of Nova Scotia, *post* p. 281, TASCHEREAU, J., dissenting, that, as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignee, and would be unable to recover from the assignor, who had parted with all his property, they would

be hindered and delayed in the recovery of their debts, and the deed was, therefore, void under the statute of Elizabeth.

Ross, Q.C., and McNeil, for the appellant.

Harrington, Q.C., for the respondent.

[6TH MAY, 1895.]

CLINCH v. PERNETTE.

Lease for lives — Renewal — Evidence — Indorsement — Custody of lease — Duration of life — Presumption as to — Registry laws.

In 1805 a lease was executed for the lives of the lessee and two others "and renewable for ever," with a condition that if any of the lives should fall, a new life should be inserted and a renewal fine paid within twelve months, otherwise the right of renewal should be forfeited. It was also provided that if any question should arise as to the death of any one on whose life the lease depended, the person seeking to benefit thereby must prove him to be alive or else he should be presumed to be dead.

In 1884 a purchaser from the assignee of the reversion entered into possession, and in 1890 an action was brought by those claiming through the lessee to recover possession and for an account of mesne profits. The plaintiffs also claimed a declaration that the lease had been renewed by the insertion of a life in place of one of the original lives, or, in the alternative, an order that such new life be inserted or the defendants execute a new lease for the same and two other lives. On the trial a counterpart of the lease was admitted in evidence, with an indorsement signed by the devisee of the lessor, dated in 1852, and stating that a new life had been inserted in place of one that had fallen, on payment of the renewal fine therefor.

Held, affirming the decision of the Supreme Court of Nova Scotia, 26 N. S. Reps. 410, Gwynne, J., dissenting, that the lease was renewable in perpetuity, notwithstanding there was no covenant by the lessor to renew; that the indorsement on the counterpart was evidence of the insertion of a new life, and it made no difference that it was found in possession of the owner of the reversion; at all events it was a declaration binding against the defendants by their predecessor in title; and that, as to the other two lives, one was proved to be dead, and the

other, who was a married man in 1805, must, from lapse of time, be presumed to be dead for more than twelve months before the entry by the defendant in 1884. The lease, therefore, only remained in force for the duration of the new life so inserted.

The defendant in possession claimed that he was a purchaser for valuable consideration without notice.

Held, that the memorandum indorsed on the lease was not a deed, and so not subject to the registry laws, and that there was evidence of actual notice.

Quære—Is a lease for life within the terms of s. 25 of the Nova Scotia Registry Act, R. S. N. S., 5th ser., c. 84? Is a speculative purchaser entitled to the benefit of the Act?

Ross, Q.C., for the appellants.

Borden, Q.C., for the respondents.

CHATHAM NATIONAL BANK v. McKEEN.

Company—Winding-up—Sale of assets by liquidator to director—R. S. C. c. 129, s. 34.

As soon as a winding-up order against a company is made under the Dominion Winding-up Act, the relations between the directors and the company or its shareholders are at an end, and a sale by the liquidator of the property of the company to a director is valid.

Gormully, Q.C., and *Orde*, for the appellant.

Code, for the respondents.

NEW BRUNSWICK.]

BRADSHAW v. FOREIGN MISSION BOARD.

Practice—Equity suit—Application for new trial—Forum—53 V. c. 4, s. 85 (N.B.)

By 53 V. c. 4, s. 85 (N.B.), relating to proceedings in equity, it is provided that in a suit in equity "either party may apply for a new trial to the Judge who tried the case."

Held, reversing the decision of the Supreme Court of New Brunswick, *TASCHEREAU*, J., dissenting, that the Act does not

mean that the application must be made to the individual who had tried the case, but to a Judge exercising the same jurisdiction. Therefore, when the Judge in equity who tried the case had resigned his office, his successor could hear the application.

C. A. Stockton, for the appellant.

Palmer, Q.C., for the respondent.

TOWN OF ST. STEPHEN v. COUNTY OF CHARLOTTE.

Canada Temperance Act—Application of penalties—Incorporated town, separated from county for municipal purposes.

By an order-in-council made in September, 1886, all fines, penalties, or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county or any incorporated town separated for municipal purposes from the county, which would otherwise belong to the Crown for the public uses of Canada, shall be paid to the treasurer of the city, incorporated town, or county, as the case may be, for the purposes of the said Act.

St. Stephen is an incorporated town in the county of Charlotte, N. B., having its own mayor and governing body, police magistrate, and other officials. It contributes, jointly with the county, to the support of the county gaol, registry office, sheriff's office, and other institutions. A number of convictions for offences against the Canada Temperance Act having taken place in the town, a special case was stated for the opinion of the Supreme Court of the province as to whether the town or county treasurer was entitled to the fines therefor. The Supreme Court decided in favour of the county.

Held, reversing such decision, KING, J., dissenting, that "an incorporated town separated from the county for municipal purposes," in the order-in-council, did not mean a town separated for all purposes, but included any town that was self-governing and practically free from control by the county. St. Stephen, therefore, notwithstanding that it was joined to the county for the purposes mentioned, was a town "separated from the county for municipal purposes" within the meaning of the order-in-council.

Blair, Q.C., A.-G., for the appellants.

Pugsley, Q.C., and *Grimmer*, for the respondents.

Exchequer Court of Canada.

NOVA SCOTIA ADMIRALTY DISTRICT.

[McDONALD, L.J., 14TH AUGUST, 1895.]

REGINA v. ANNIE ALLEN.

Jurisdiction — Exchequer Court — Local Judge — Inland Revenue Act — Penalties.

The defendant was prosecuted for having cigarettes in her possession, not stamped as required by the Inland Revenue Act, she not being a licensed manufacturer. The offence was fully proved, but the jurisdiction of the Court was challenged.

Tremaine, Q.C., for the defendant. This Court has no jurisdiction. I admit that the Vice-Admiralty Court had, and that Mr. Justice Burbidge has; but not a local Judge in Admiralty.

J. A. Chisholm, for the Crown. The Inland Revenue Act, s. 113, provides that the penalty may be recovered in any Court of Vice-Admiralty having jurisdiction in the premises. The Colonial Courts of Admiralty Act, 53 & 54 V. c. 27, s. 2, s.-s. 3 (Imp.), vests the jurisdiction in any colonial Court of Admiralty; and the Admiralty Act of Canada, 1891, s. 3, makes the Exchequer Court of Canada a colonial Court of Admiralty. Section 9 of the same Act confers upon the local Judge, within his district, all the powers of the Judge of the Exchequer Court with respect to the Admiralty jurisdiction of the Court. This is Admiralty jurisdiction, as distinguished from the jurisdiction of the Exchequer Court before the abolition of the Vice-Admiralty Courts.

McDONALD, L.J.—This is a proceeding to recover penalties for violation of s. 834 of R. S. C. c. 34. The offence charged was established, but on the hearing a doubt was suggested as to the jurisdiction of the Court. The question was whether the jurisdiction given to the Vice-Admiralty Courts in Canada by

s. 113 of R. S. C. c. 34 is confirmed in the District Admiralty Courts by the legislation relating to Admiralty Courts in 1890. It was contended by the learned counsel for the Crown that by s.-s. 3 of s. 2 of the Imperial Act 53 & 54 V. c. 27, the jurisdiction conferred upon the Vice-Admiralty Court by s. 113 of the Inland Revenue Act is continued in the present District Admiralty Court, or, in the words of the section, that the words "Colonial Court of Admiralty" must be read into s. 113 instead of "Court of Vice-Admiralty." This appears to be the reasonable construction to be given to the Acts, and I therefore decide in favour of the jurisdiction.

ONTARIO.

Supreme Court of Judicature.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 18TH JUNE, 1895.]

In re BALL v. BELL.

Prohibition—Division Court—Mortgage—Contract or obligation to indemnify against—Action for interest only—Dividing cause of action—R. S. O. c. 51, s. 77.

Where the plaintiff conveyed land to the defendant subject to a mortgage, and after maturity of the mortgage paid the mortgagee two gales of interest accruing since maturity, which he sought to recover from the defendant by action in a Division Court :—

Held, reversing the decision of Armour, C.J., 26 O. R. 128, *ante* p. 102, that there was no splitting of the cause of action

within s. 77 of the Division Courts Act, R. S. O. c. 51, and therefore the action was maintainable.

N. F. Davidson, for the plaintiff.

S. W. McKeown, for the defendant.

KENNEDY v. MERRICK.

Mortgage—Covenant of indemnity—Assignment of—Agreement by assignee to release assignor on obtaining judgment—Effect of.

C., as security for a loan of \$7,000, mortgaged a number of lots to A., the mortgage containing a provision for the release of part of the mortgaged premises upon payment of a proportionate part of the mortgage money. C. conveyed his equity of redemption to D., who assumed the mortgage and agreed to indemnify C. against it. D. conveyed his equity of redemption in half of the lots to the defendant, subject to half of the mortgage, and subject to the half of another mortgage on the lots, the defendant agreeing to assume the half of such mortgages, and to indemnify D. against the same. A. assigned the mortgage to the plaintiff, reciting that it had been reduced to \$3,500, and conveyed the land therein contained, save and except the part released. C. assigned to the plaintiff D.'s covenant of indemnity, D. agreeing to release C. from his liability upon obtaining judgment against the defendant on his covenant, but such release was not to prejudice any rights the plaintiff might have against any parties through whom C. might claim or who might claim through him. D. also assigned to the plaintiff all his right under the defendant's covenant of indemnity, the plaintiff by deed agreeing to release D. on his obtaining judgment against the defendant.

Held, that the plaintiff's agreement to release C. and D. upon obtaining judgment against the defendant in no way interfered with his right to recover such judgment.

H. J. Scott, Q.C., for the plaintiff.

E. D. Armour, Q.C., for the defendant.

SCARLETT v. NATTRESS.

Mortgage—Action on covenant—Release—Assignment.

The plaintiffs and their father J., being the owners of certain land, in 1889 entered into partnership for the manufacture of brick on the north-east corner of the land. A part of the land had been subdivided, and two of the lots sold to the defendant, who gave back separate mortgages for the unpaid purchase money. On 8th February, 1890, the defendant sold these two lots to S., subject to the mortgages thereon. By a deed dated 1st July, 1890, S. sold these lots to J., subject to the mortgages, which J. covenanted to pay off. By an assignment dated 8th July, 1890, the plaintiffs and J. assigned to a loan company certain mortgages on the subdivision lots. The mortgages so assigned comprised J.'s share of a number of mortgages given to the plaintiffs and J. by purchasers of such subdivision lots, according to a division thereof made between the plaintiffs and J., while the mortgages taken by the plaintiffs as their share included those on the two lots. Notwithstanding the fact of the dates of S.'s deed and the loan company's assignment, the latter was prior in point of time. On the 11th August J. assigned to the plaintiffs all his interest in the two mortgages in question. On the 1st October, 1894, S. assigned to the defendant J.'s covenant of indemnity.

In an action against the defendant on his covenants in the two mortgages to pay the mortgage money:—

Held, that the plaintiffs were entitled to recover, for what had taken place in no way released the defendant from his covenants.

The defendant also claimed to be released by reason of an alteration of the property by the change of location of a street, but the evidence failed to substantiate this.

J. M. Clark, for the plaintiffs.

E. P. McNeill, for the defendant.

[BOYD, C., 2ND JULY, 1895.]

CONSUMERS' GAS CO. v. CITY OF TORONTO.

Assessment and taxes—Gas mains—Liability to assessment.

The mains of a gas company laid beneath the surface of public streets are assessable by the municipality, being, with the

underground soil occupied by them, appurtenances to the central land upon which the manufacture is carried on, and subject to taxation as realty of the company.

McCarthy, Q.C., and W. N. Miller, Q.C., for the plaintiffs.

Robinson, Q.C., for the defendants.

[MEREDITH, C.J., 18TH MARCH, 1895.]

REGINA v. WELTER AND HENDERSHOTT.

Criminal law—Evidence—Admissibility—Evidence of prisoners before coroner—Privilege—Insurance frauds—Evidence of previous attempts.

On the trial of the defendants for murder, the alleged motive being to obtain insurance moneys under a policy effected on the life of the deceased in favour of one of the prisoners:—

Held, that a coroner's court is a criminal court, and that being so, 56 V. c. 81 (D.) applies to it; and the evidence given there by the prisoners before arrest was rejected when tendered against them on their trial, notwithstanding they had claimed no privilege.

Held, also, that evidence of previous attempts to insure the lives of other persons for the benefit of the prisoners, could not be received.

Osler, Q.C., D. J. Donahue, and K. Hillyard Cameron, for the Crown.

Norman Macdonald, for the prisoner Welter.

John A. Robinson, for the prisoner Hendershott.

[28TH JUNE, 1895.]

HENDRIE v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

Railways—Lands injuriously affected—Right to compensation.

The sections of the Dominion Railway Act, 1888, under the headings "Plans and Surveys" and "Lands and their valuations," apply as well to lands "injuriously affected" as to lands taken for the purposes of the railway.

It is no answer to a complaint by a land-owner that the company is proceeding without having taken the necessary steps under these sections, that he has the authority of the Railway Committee of the Privy Council for the execution of the works.

Held, also, that a by-law passed by the municipal council for granting aid to the railway and the validating Act, 58 V. c. 68 (O.), did not affect this question.

Bruce, Q.C., for the plaintiff.

Osler, Q.C., and *Carscallen*, Q.C., for the railway company.

D. W. Saunders, for the contractor.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 27TH MAY, 1895.]

FAIRWEATHER v. OWEN SOUND STONE QUARRY COMPANY.

Master and servant—Negligence—Fellow servant—Liability at common law—Defective appliances.

S., one of the directors of a quarry company, was appointed foreman of the works, with full powers of management, but subject to the directors' control, and to the performance of such duties as might be delegated to him from time to time. The plaintiff, one of the company's labourers, claiming that he had sustained injury by reason of S.'s negligence, while acting under his instructions, brought an action at common law against the company.

Held, that, so far as the action rested upon the liability of the company through S., there was no liability, for S. was merely a fellow servant of the plaintiff.

Held, however, that an action might be sustained on proof of negligence of the company in not furnishing proper appliances for the quarrying operations.

Elgin Myers, Q.C., and *Fish*, for the plaintiff.

E. F. B. Johnston, Q.C., and *George Ross*, for the defendants.

[MEREDITH, C.J., 15TH JULY, 1895.]

UNION SCHOOL SECTION FIVE, TOWNSHIP OF
HULLETT v. LOCKHART.*Public schools—Union school sections—Alteration of—Petition of ratepayers—Award—54 V. c. 55, ss. 87, 96.*

By s.-s. 1 of s. 87 of the Public Schools Act, 54 V. c. 55, it is enacted that "on the joint petition of five ratepayers from each of the municipalities concerned, to their respective municipal councils, asking for the formation, alteration, or dissolution of a union school section," etc., certain proceedings may be taken.

Held, that a petition to be valid under this enactment must be the joint petition of five ratepayers from each municipality in the case of each petition: that is to say, in each petition presented to each council five ratepayers from each municipality must join.

An award based upon a petition not conforming to the above requirements is void *ab initio*, and is not within the purview of s. 96 of the Act.

By s.-s. 11 of s. 87 it is enacted that "no union school section shall be altered or dissolved for a period of five years after the award of the arbitrators has gone into operation," etc.

Held, that this prohibition does not apply to the case of an award that "no action should be taken in the matter of the said petition," but only to awards effecting some change in the *status quo ante*.

Garrow, Q.C., for the plaintiffs.

E. L. Dickenson, for the defendants.

COMMON PLEAS DIVISION.

[MEREDITH, C.J., AND ROSE, J., 29TH JUNE, 1895.]

REGINA v. McBRIDE.

Criminal law—Forgery—Evidence—Corroboration—Criminal Code, 1892, ss. 684, 743.

Case reserved by the police magistrate for the town of Chatham under s. 748 of the Criminal Code, 1892.

There were two charges of forgery against the prisoner. The writings alleged to have been forged were a certificate of death for the purpose of supporting a claim against an insurance company and an indorsement upon a cheque drawn by the company in settlement of the claim.

It was proved at the trial that the writings were forgeries, and it was sought to connect the prisoner with them by the evidence of a single witness, who testified that they had been written by the accused.

By s. 684 of the Code it is enacted that no one shall be convicted of forgery, amongst other enumerated crimes, upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

The only corroboration in this case was supplied by proof that certain names written in a book, which were sworn by the same witness to be in the handwriting of the accused, were written by the same hand as the forged writings.

Held, that this was not such corroboration as the section requires, and that the convictions upon both charges must be quashed.

Dymond, for the Crown.

O. L. Lewis, for the prisoner.

[THE DIVISIONAL COURT, 29TH JUNE, 1895.]

STEWART v. WOOLMAN.

Trial—Jury—Improper influence—New trial.

Where the plaintiff was proved to have conversed with members of the jury, after they had been sworn, upon the subject of his case, and, either personally or by another in his interest, to have treated them to drink, the verdict was set aside and a new trial ordered.

Haughton Lennox, for the plaintiff.

Strathy, Q.C., for the defendant Ambler.

[18TH JULY, 1895.]

CRANE v. HUNT AND WAYPER.

Intoxicating liquors—Action against tavern-keepers—Death from excessive drinking—R. S. O. c. 194, s. 122—Joint action—Election—Discontinuance.

Where intoxicating liquors had been supplied to the plaintiff's deceased husband at two taverns and to excess in each, so that the plaintiff might, under s. 122 of R. S. O. c. 194, have successfully maintained an action against either of the tavern-keepers for the death of her husband:—

Held, per MEREDITH, C.J., that she could, and per MACMAHON, J., that she could not, maintain a joint action against the two.

The jury having assessed the damages at different sums against the two defendants, the plaintiff was permitted to elect to enter judgment against either, undertaking to discontinue against the other.

Wallace Nesbitt, for the plaintiff.

Haverson and G. St. V. Morgan, for the defendant Wayper.

Kilmer, for the defendant Hunt.

[BOYD, C., 27TH MAY, 1895.]

SYLVESTER v. MURRAY.

Contract—Sale of land—Purchase money—Conditional promise—Effect of.

After negotiations had taken place for the sale of a farm at \$9,500, the following written contract was signed by the purchasers:—"We agree to take your farm and pay you \$9,000, and if we get along fairly well, we will give you the other \$500 as soon as we are able."

Held, that the provision as to the \$500 was a conditional promise on which a recovery might be had, upon proof that the purchasers were of ability to pay, which the evidence in this case failed to show.

A. McLean Macdonell, for the plaintiff.

Watson, Q.C., for the defendants.

[FERGUSON, J., 8TH JUNE, 1895.]

In re GARBUTT AND ROUNTREE.*Will—Construction—Devise—Life estate—Estate in fee—Title to land—Vendor and Purchaser Act.*

A testator devised certain land to his son W. during his lifetime, and in the event of his death, leaving his wife surviving him, he gave the rents, issues, and profits to her during her lifetime or widowhood ; but in the event of both dying within thirty years from his death, he gave the rents and profits thereof, until the expiration of such thirty years, to W.'s children, equally share and share alike, and after W.'s death, and after the death or re-marriage of his wife, and provided that the thirty years should have elapsed, to all of W.'s children by his said wife, share and share alike, to have and to hold the same after the specified periods to them, their heirs and assigns forever. By the last clause of the will the testator gave all the residue of his estate, real, personal, and mixed, of whatever nature or kind soever, and not otherwise disposed of by his will, to W. to have and to hold the same to him, his heirs and assigns forever.

The testator died on the 9th January, 1876 ; W. and his wife both survived the testator and enjoyed their life estates, but were since dead, leaving eight children, of whom one died unmarried and without issue. The others were still living.

On a petition under the Vendor and Purchaser Act:—

Held, that under the will the fee in the land, subject to the estate devised to the children until the expiration of the thirty years, vested in W. and his heirs, and, in the absence of any evidence showing whether or not W. had disposed of the land, the children could not impart a good title in fee.

J. W. St. John, for the petitioner.

D. C. Ross, for the respondent.

[ROSE, J., 3RD MAY, 1895.]

TIERNAN v. PEOPLE'S LIFE INSURANCE COMPANY.

Life insurance—Premium—Payment of.

The application for a life insurance policy provided that no policy was to be in force until actual payment and acceptance of

the first payment due thereon by an authorized agent, and the delivery to the insured of the necessary receipt signed by the general manager. The policy stated that in consideration of the annual premium being paid in advance to the company at its head office on or before the delivery of the policy, and thereafter annually, the company would pay to the insured's executors the amount of the policy. By the contract between the general managers and the company, the former were to receive eighty-five per cent. of the premiums, and were authorized to employ sub-agents, whom they were to pay out of the commission allowed them, and were to indemnify and save harmless the company against any claims for commission by such sub-agents. One of the company's general managers, who had taken the application, agreed with the applicant that in consideration of certain work done by the applicant for him, the first premium should be considered as paid, and he gave the applicant the company's official receipt, and subsequently the policy. In consequence of no payment having been made on the policy, the company cancelled the policy, but it did not appear that the insured had ever been notified of this. In an action to recover on the policy:—

Held, that no valid payment of the premium had ever been made, and that therefore the insurance never took effect.

Osler, Q.C. and *J. B. Jackson*, for the plaintiff.

A. T. Hunter, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

In re ANTIGONISH DOMINION ELECTION.

MCGILLIVRAY v. THOMPSON.

Election petition—Extension of time for trial—Fixing date of trial for a day subsequent to the expiry of the period of six months.

An order extending the time for trial of an election petition to a time beyond the period of six months fixed by R. S. C. c. 9, s. 82, can only be obtained on affidavit showing that the interests of justice require such extension.

An order fixing a day after the expiry of the six months for the trial of the petition will not of itself have the effect of extending the time.

Per RITCHIE, J., dissenting.—Where a date beyond the limited period is fixed for commencing the trial, it must be presumed, if the Court had jurisdiction, that the time for going to trial was also extended.

La Prairie case considered and distinguished.

In re ANNAPOLIS DOMINION ELECTION.

RAY v. MILLS.

Election petition—Extension of time for trial—Affidavit—Waiver—Public interests—Procedure—Judicature Rules.

The respondent obtained an order staying proceedings pending an appeal to the Supreme Court of Canada against an order dismissing preliminary objections. By one of the paragraphs of the order the time for the commencement of the trial was extended by the length of the period during which the stay of proceedings should operate. No affidavit was read in support of the application for the extension of time.

Held, per McDONALD, C.J., and TOWNSEND, J., that the language of the Controverted Elections Act, R. S. C. c. 9, s. 88, is imperative that such an order shall only be allowed when supported by affidavit.

2. That, public interests being involved, neither petitioner nor respondent could by agreement or waiver substitute another procedure for that required by the statute.

3. Following *Paint v. Gillies*, 26 N. S. Reps. 526, that the time for the commencement of the trial could not be fixed for a day within the term of the Supreme Court, when the trial could not be legally commenced or proceeded with, and when an election petition could not be set down for trial.

4. *Per McDONALD, C.J.*, that under the Judicature Rules, which govern when no other procedure is provided, a motion to enlarge the time for trial cannot be made *ex parte*.

5. *Per RITCHIE, J.*, dissenting, that where the Judge is satisfied from reading the original orders made in the cause that the

requirements of justice render the extension necessary, he may make the order without requiring the affidavit.

6. That the respondent could not be allowed to set aside his own order for irregularity, or because it was not founded upon sufficient material, after it had been served and acted upon.

7. That the public interests would be better promoted by sending the cause to trial, than by dismissing the petition on a technical ground.

8. That the objection as to the want of the affidavit was a technical one within s. 49 of the Act, which provides that no proceeding shall be thus defeated.

In re PICTOU DOMINION ELECTION.

McCOLL v. TUPPER.

Election petition—Order extending time for trial—Motion to set aside—Estoppel—Jurisdiction of Court—R. S. C. c. 9—Setting case down for trial.

The respondent, with the consent of the petitioner, obtained an order staying proceedings pending an appeal to the Supreme Court of Canada against an order dismissing preliminary objections. The respondent's order contained a clause extending the time for the commencement of the trial during the length of the stay of proceedings, the Judge to whom the application was made having declined to grant the stay except upon that condition. No affidavit was read in support of the application, but, under the notice of motion, all the papers on file were before the Judge when the order was made, and among these were several affidavits.

Held, per WEATHERBE, J., that the respondent, having acquiesced in the decision of the Judge to whom his application was made, and having submitted to the insertion of the condition as to the extension of time in his order, so as not to lose the advantage of the stay of proceedings, was estopped from moving to set the order aside.

2. That the case having been assigned to the trial Judge, and fixed for trial, when the motion was made, the functions of the Court were at an end, and the matter was wholly within the jurisdiction of the trial Judge.

8. That the words of the Dominion statute, that no trial of an election petition shall be commenced or proceeded with during any term of the Court at which the trial Judges are by law required to sit, are merely directory in their character, and were not applicable, terms of the Court having been abolished in Nova Scotia, and the Court being always open, and having power to assign Judges to perform particular duties.

4. *Per RITCHIE, J.*, that the case was distinguishable from *McDonald v. Cameron*, 27 N. S. Reps. 1; that the decision in that case as to the necessity of the affidavit was therefore not binding; and that the motion to set aside the order extending the time should be dismissed for the reasons there stated.

5. That, as to setting the case down for trial during the session of the Court, there was no distinction between the cases, and the former decision was binding.

6. *Per MEAGHER, J.*, that, for the reasons given in the previous cases, the respondent's motion should prevail.

CUMMINGS v. McDONALD.

Assignment for benefit of creditors—Preference to assignee for money advanced and debts assumed—Bona fides—Evidence of indebtedness—Burden of proof.

A deed of assignment made to the plaintiffs, for the benefit of creditors, was attacked by the defendant as fraudulent and void under the statute of Elizabeth, on the ground that the plaintiffs were preferred for a larger amount than that actually due them. Evidence was given to show that the difference between the amount of the indebtedness and the amount of the preference was made up of moneys advanced by the plaintiffs and debts assumed by them.

Held, per RITCHIE and TOWNSEND, JJ., that the onus was on the defendant to show that the conveyance was fraudulently made, and that the debts agreed to be paid were not really due.

Per RITCHIE, J., that the deed was good under the statute, the evidence showing that it was made *bona fide*, and not as a cloak for retaining a benefit to the grantor.

Per TOWNSEND, J., that, while there were objectionable features in connection with the making of the assignment, the facts that there was no secrecy about it, that the business was

not continued in the name of the assignor, and that the debts stipulated to be paid were either paid or in course of liquidation, distinguished the case from *Ex p. Chaplin*, 26 Ch. D. 819.

Per MEAGHER, J., that there should be a new trial, the method adopted being calculated to exclude inquiry, and leave the matter entirely within the control of the assignor, and the evidence to prove the existence of the indebtedness assumed by the plaintiffs being insufficient.

(Reversed by the Supreme Court of Canada, *ante* p. 264).

REGINA v. HURLBERT.

Canada Temperance Act—Order for destruction of liquors—Information and warrant—Jurisdiction of magistrate—Subsequent evidence or conviction.

The defendant's premises were entered, under a search warrant issued by the stipendiary magistrate for the town of Yarmouth, and a quantity of liquor found there seized and taken away, and an order for its destruction made. Neither the warrant nor the information upon which it was granted showed that the premises were within the magistrate's jurisdiction.

• *Held*, that the information was the basis of the proceedings, and without an information and warrant thereon showing liquors kept for sale within the magistrate's jurisdiction, he could not make the order for destruction.

2. That the magistrate could not by subsequent evidence or conviction of the party, make that legal which in its inception was utterly without authority.

The Queen v. Hughes, 4 Q. B. D. 614, distinguished.

[GRAHAM, J., AUGUST, 1895.]

REGINA v. MOREAU.

Summary conviction—Desertion from ship—Penalty—Imprisonment—Hard labour—R. S. C. c. 74, s. 91 (a)—Habeas corpus—Discharge.

One Louis Moreau, having been brought before the stipendiary magistrate and recorder for the town of Pictou, charged with desertion from the SS. *St. Olaf*, confessed the charge, and was convicted and sentenced "to be imprisoned in the county gaol at Pictou for eight weeks, forfeiting wages as provided in Act."

A writ of *habeas corpus* was applied for and obtained, and a motion for the prisoner's discharge heard before GRAHAM, J.

For the prisoner it was contended that the warrant was bad under s. 91 (a) of the Seamen's Act, R. S. C. c. 74, which declares that: "For desertion he shall be liable to imprisonment for any term not exceeding twelve weeks and not less than eight weeks, with hard labour, and also to forfeit all or any part of the clothes and effects he leaves on board, and all or any part of the wages or emoluments which he has then earned;" inasmuch as the warrant of commitment merely required the "keeper of the said county gaol to receive the said Louis Moreau into your custody in the said county gaol, there to imprison him for the term of eight weeks," no hard labour being awarded in the sentence or contained in the warrant, as required by the terms of the statute, and the warrant was therefore bad as containing an insufficient penalty, the minimum penalty authorized by the statute being "eight weeks' imprisonment with hard labour."

Contra, that the word "liable" in s. 91 (a) conferred a discretion as to the amount of penalty to be awarded.

GRAHAM, J., with some doubts, held the warrant bad under s. 91 (a), as omitting hard labour, and made an order for the discharge of the prisoner.

(Reported by J. H. Vickery, Esquire.)

MANITOBA.

In the Queen's Bench.

[FULL COURT, 18TH JULY, 1895.]

In re HAMILTON TRUSTS.

Mortgage—Promissory note—Collateral security—Surety—Realisation of securities—Rights of parties.

Appeal from decision of TAYLOR, C.J., *ante* p. 110.

Appeal allowed. The Master's report to be varied by finding that Drewry was entitled to \$189.20, the balance due on his first mortgage, and James Hamilton to the remainder of the moneys in Court. Drewry to pay the costs of the appeal and the re-hearing.

[TAYLOR, C.J., 2ND AUGUST, 1895.]

In re SCOTT AND CITY OF BRANDON.*Assessment and taxes—R. S. M. c. 101, s. 79—Appeal from Court of Revision—Notice of appeal—Time—Sunday.*

Rule *nisi* for a writ of mandamus to compel the Judge of the County Court of Brandon to hear an appeal under s. 79 of the Assessment Act, R. S. M. c. 101.

The applicant's appeal against his assessment was disposed of by the Court of Revision on 11th April. Section 79 provides that if a person be dissatisfied with the decision of that Court, he may appeal therefrom, in which case "he shall within ten days after the decision . . . serve upon . . . the clerk of the municipality a written notice of his intention to appeal," etc. The only question was whether the notice was served within the time limited.

The decision of the Court of Revision was given on the 11th April, so the ten days within which a notice of appeal could be served expired on the 21st; but that day was a Sunday, and the notice was served on the next day, Monday, the 22nd April.

The contention of the applicant was that under the Interpretation Act, R. S. M. c. 78, s. 8, clause (s), he had the whole of Monday on which to serve his notice.

The County Court Judge held that the required notice had not been given in time, and that he had no jurisdiction to hear the appeal.

Held, that the rule must be discharged with costs. It might be a hardship that in this case the applicant, a resident in Ontario, had not sufficient time for perfecting and serving his notice of appeal, but the hardship was one with which the Legislature only could deal. Under the present wording of the Act, the applicant could not have relief.

C. H. Campbell, Q.C., for the applicant.

H. M. Howell, Q.C., for the City of Brandon.

[8TH AUGUST, 1895.]

In re HAMILTON TRUSTS.*Costs—Surplus paid into court by mortgages—Costs of claimants.*

A loan company exercised a power of sale in their mortgage,

and paid into Court under the Trustees' Relief Act a surplus over what was due them, there being rival claimants to the fund. One of the claimants then presented a petition praying that inquiries might be made and accounts taken to ascertain who were entitled to the fund, and for payment out. Upon this petition an order was made directing a reference to the Master to inquire who were entitled to the moneys in Court, and in what order of priority, and further directions and costs were reserved. The Master made a report finding one Drewry entitled to a certain amount, and the petitioner entitled to the remainder of the fund.

An appeal from this report by the petitioner was dismissed with costs, but on re-hearing (*ante* p. 288) allowed by the full Court, when the amount due Drewry was decreased and the amount due the petitioner correspondingly increased.

The matter was then brought on upon further directions and on the question of costs.

Held, that both parties being entitled to share in the fund, they should each bear their own costs, except in so far as they might have been increased by Drewry's claim to share in the fund beyond the amount due under the first mortgage. Any increased costs occasioned by the further claim should be paid by Drewry to the petitioner.

Monkman, for the petitioner.

Perdue, for Drewry.

[17TH AUGUST, 1895.]

COLQUHOUN v. SEAGRAM.

Equitable assignment—Book debts—Husband and wife—Interpleader issue.

The defendant, a judgment creditor of Andrew Colquhoun, on 18th November, 1894, obtained and served an order garnishing a debt due from the Manitoba Club to the judgment debtor. The plaintiff, another judgment creditor of A. Colquhoun, claimed the same debt under an assignment dated 16th October, 1894. The club paid the money into Court, and an issue was directed to be tried in a County Court to determine which of the claimants was entitled to the money. The Judge of the County Court found in favour of the defendant, and the plaintiff appealed.

Held, that the appeal should be allowed with costs and the judgment upon the issue entered for the plaintiff.

Here was a married woman who had a judgment for a large amount against her husband. There was nothing upon the evidence to impeach the validity of that judgment, and the plaintiff was rightfully a creditor of her husband, and this being the case, he executed an assignment to her of book debts owing to him. It might be that at law that assignment gave her no title to these book debts, that it left the title to them in the husband just as before; but the effect of it in equity was different.

On the trial of an interpleader issue such as this, the Court must take notice of equitable rights: *Rusden v. Pope*, L. R. 3 Ex. 269; *Duncan v. Cashin*, L. R. 10 C. P. 554; *Engelback v. Nixon*, L. R. 10 C. P. 645.

In equity the effect of such an assignment is that the husband upon its execution becomes a trustee for his wife of what has been assigned: *Baddeley v. Baddeley*, 9 Ch. D. 118; *Fox v. Hawks*, 18 Ch. D. 822.

Hough, Q.C., for the plaintiff.

Crawford, Q.C., for the defendant.

[BAIN, J., 28RD JULY, 1895.]

TRUST AND LOAN CO. v. WRIGHT.

Sale of goods—Sale of horses by debtor to his mother—Bills of Sale Act—Immediate delivery—Change of possession—Seizure of horses under execution against vendor—Interpleader issue.

County Court appeal. Interpleader issue.

Under an execution against the defendant a bailiff seized some horses which were claimed by the claimant, and this issue was directed to determine the question of ownership. The defendant was a farmer, and on 2nd October, 1894, a verbal agreement was made by him with his mother, the claimant, for the sale of the horses to her, and part of the purchase money was then paid. The parties considered the sale was completed and that the property in the goods had been transferred. At this time the debtor, with a hired boy, was living on his farm, which was several miles distant from the residence of the

claimant; the horses and other goods sold were on the debtor's farm.

In buying the farm and chattels the intention of the claimant was to have a man named Lindsay live on and take charge of the place for her, but as Lindsay was not able to go into charge at this time, she stipulated with the debtor that he was to look after the property for her until Lindsay was ready. The execution debtor and the boy continued to live on the farm and looked after the horses until 12th November, just as they had been doing before 2nd October.

On 12th November the debtor left the place, and, calling at the claimant's residence, he told her he had left everything the claimant had bought from him all right, and that the boy could take care of them till Lindsay came. The next day Lindsay went into possession of the place and the goods on behalf of the claimant. The writ of execution in the plaintiffs' suit was handed to the bailiff in January, 1895, and when he seized the horses on 15th March they were in the possession of Lindsay, who was the servant or bailee of the claimant. The County Court Judge entered a verdict for the claimant. In appealing against this decision the plaintiffs urged, first, that the Judge erred in finding that there was an actual and *bona fide* sale of the horses from the debtor to the claimant; and, second, that the sale, even if an actual sale was intended, was void, because it was not in writing and was not accompanied by an immediate delivery of the animals and was not followed by an actual and continued change in their possession.

Held, that the first objection could not be sustained. The claimant was the mother of the debtor, and the circumstances of the sale were somewhat unusual, and so they might tend to excite suspicion. However, the mere fact of the relationship of the parties was not in itself evidence of fraud, and as there was evidence to support and justify the decided opinion the County Court Judge came to that an actual and *bona fide* sale was intended, his decision on this question must be upheld.

Held, as to the second point, that when the horses were delivered to Lindsay on the day following the 12th November, the requirement of the statute of an "immediate delivery" was complied with. What took place between the parties on 12th November was sufficient to make a fresh agreement of sale; it

was clear that the delivery of the animals was made with the express assent of the vendor.

Hovey v. Whiting, 14 S. C. R. 515, followed.

Jackson v. Bank of Nova Scotia, 9 Man. L. R. 75, 18 Occ. N. 112, distinguished.

Ewart, Q.C., for the plaintiffs.

W. A. Macdonald, Q.C., for the claimant.

[26TH JULY, 1895.]

GILES v. HAMILTON PROVIDENT AND LOAN
SOCIETY.

Costs—Suit for mortgage account.

Hearing on further directions and the question of costs. Both parties asked that they should be given costs.

The defendants were the first mortgagees of certain lands, and the plaintiff second mortgagee. The defendants sold under the power of sale, and realized more than the amount of their claim; the surplus was claimed by the plaintiff. The defendants did not dispute his right, and admitted a surplus of \$28, which they were willing to pay over, and subsequently paid into Court. The plaintiff, however, claimed more, and filed a bill for an account. At the hearing a decree was made referring it to the Master to take an account, and he found that the defendants had realized \$64.16 more than their claim.

There was no suggestion of misconduct on the part of the defendants.

Held, that the plaintiff's claim that costs be given against the defendants could not be entertained. The defendants were entitled to costs of suit down to and including the hearing and decree, but no costs of taking the accounts or of the hearing on further directions.

Charles v. Jones, 35 Ch. D. 544, followed.

Bradshaw, for the plaintiff.

Clark, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

STREET, J.]

[27TH SEPTEMBER, 1895.

CHAMBERS v. KITCHEN.

Revivor—Order for, after judgment—Motion to set aside—Rule 622.

Order and decision of STREET, J., 16 P. R. 219, refusing to set aside order of revivor, affirmed.

L. F. Heyd, for the appellant.

H. J. Scott, Q.C., for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[ROSE, J., 12TH SEPTEMBER, 1895.

RICE v. KINGHORN.

Costs—Mortgage action—Appearance—Judgment—Rule 718 (1349).

Where a defendant in a mortgage action desires only to dispute the amount claimed, but, instead of giving the notice referred to in Rule 718 (1349), enters an appearance in which

he disputes the amount, judgment cannot be entered on *precipe*; a motion to the Court becomes necessary, and the defendant so appearing must pay the additional costs of it.

W. H. Blake, for the plaintiff.

No one appeared for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 27TH MAY, 1895.]

KELLY v. BARTON.

KELLY v. ARCHIBALD.

Arrest—Notice of action—Malice—Reasonable and probable cause—R. S. O. c. 73.

The object of the Act to protect justices of the peace and others from vexatious actions, R. S. O. c. 73, is for the protection of those fulfilling a public duty, even though in the performance thereof they may act irregularly or erroneously, and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause; but where the officer voluntarily does something not imposed on him in the discharge of any public duty, the notice need not contain these allegations.

A breach of a city by-law for driving an omnibus without the license required thereby does not justify the summary arrest of the offender, even though the officer may have believed that he was acting legally and in the discharge of his official duty.

A resolution of the executive committee of the city council authorizing the city solicitor to defend actions brought against police officers for their alleged illegal acts, does not constitute a ratification thereof by the city.

McCarthy, Q.C., and *C. R. W. Biggar*, Q.C., for the plaintiffs.

W. R. Riddell, for the defendants Barton and others.

Fullerton, Q.C., for the defendants the City of Toronto.

COMMON PLEAS DIVISION.

[MEREDITH, C.J., AND ROSE, J., 29TH JUNE, 1895.]

REGINA v. PATTERSON.

*Criminal law—Variance between indictment and charge—False pretences—
Criminal Code, 1892, s. 641.*

Crown case reserved.

The Criminal Code, 1892, s. 641, provides that "anyone who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, . . . or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice."

The prisoner was committed for trial by a magistrate on a charge of stealing 2,200 bushels of beans. An indictment was preferred against him at the Assizes, however, for obtaining by false pretences two cheques, the false pretences being "that there was then a large quantity of beans, to wit 2,680 bushels," in the prisoner's warehouse. As a matter of fact what the evidence taken before the magistrate disclosed was that the prisoner obtained the cheques on the false pretence that "there were 2,680 bushels of beans" in his warehouse.

Held, that there was no such variation here as prevented the indictment being for a charge "founded upon the facts or evidence disclosed" within the meaning of the above section.

Per MEREDITH, C.J.—It was enough that facts or evidence disclosed on the depositions were sufficient to found a charge of false pretences in respect of the same subject-matter which was the foundation of the charge of stealing upon which the accused was committed for trial.

Clute, Q.C., for the prisoner.

J. R. Cartwright, Q.C., for the Crown.

[THE DIVISIONAL COURT, 13TH JULY, 1895.]

BROUGHTON v. TOWNSHIPS OF GREY AND ELMA.

Municipal corporations—Drainage by-law—Obligations of initiating and contributory townships respectively—55 V. c. 42, ss. 579, 580, 585.

Where a township municipality has passed a by-law, purporting to be under s. 585 of the Consolidated Municipal Act, 1892, for the purpose of making certain alterations and improvements in a drain, and has served an adjoining municipality, which is to be benefited by the work, with a copy of the engineer's report, etc., showing the sum required to be contributed by the latter, as directed by s. 579, and the by-law of the initiating township is as a fact irregular and invalid:—

Held, per MEREDITH, C.J., that the contributory township is nevertheless not only entitled, but bound, within the four months prescribed by s. 580, to pass the necessary by-law to raise its share of the estimated cost.

Held, per ROSE, J., that the contributory township cannot be required to pass a by-law raising its share till the initiating municipality has passed a valid by-law adopting the report providing for the doing of the work, including the raising of its proportion of the funds. But in this case the portion of the by-law of the initiating township adopting the engineer's report and directing the construction of the work might properly have been sustained on motion to quash by a ratepayer of that township, and an order quashing have been confined to the portion providing for raising the funds, as to which an amending by-law might have been passed; and therefore the contributory township might well proceed, relying on the good faith of the initiating township to make all necessary amendments.

Semble, per MACMAHON, J., that the contributory township had no power to pass a by-law for raising its share of the proposed expenditure until the initiating municipality had passed its by-law for the construction of the works.

J. P. Mabee, for the plaintiff.

Garrow, Q.C., for the defendants the township of Grey.

G. G. McPherson, for the defendants the township of Elma.

In the Second Division Court in the County of Victoria.

[DEAN, Co.J., 31ST JULY, 1895.]

REGINA v. HOWREY.

Master and servant—R. S. O. c. 139, ss. 12, 13, 14—Summary order of magistrate—Jurisdiction to award damages.

An appeal by the defendant under s. 14 of the Act respecting master and servant, R. S. O. c. 139, from an order of the police magistrate for the county of Victoria awarding to each of four informants a month's wages, less certain items of set-off. The magistrate found that the informants were hired outside the Province of Ontario; that they had actually worked from thirteen to fifteen days each within the Province; that the rate of wages was \$26 per month or \$1 per day; and that they were improperly discharged.

Held, upon appeal, that the magistrate's findings should not be interfered with; but that, under ss. 12 and 13 of the Act, the informants were entitled only to \$13 or \$15, as the case might be, that is, to payment at the rate of \$1 a day for the days they had actually worked; these sections contemplating only the recovery of wages for work actually done, and the magistrate having no jurisdiction to award damages for wrongful dismissal.

Steers, for the defendant.

O'Leary, Q.C., for the informants.

NEW BRUNSWICK.

In the Supreme Court.

[4TH JUNE, 1895.]

Ex parte EMMERSON.

Affidavit—Jurat—Day not arrived.

An affidavit purporting to be sworn on a day not arrived is bad.

[5TH JUNE, 1895.]

LOVITT v. SNOWBALL.

Notice of motion—Motion paper—Practice.

A motion to set aside a Judge's order and for a review of taxation of costs was dismissed because Rule 2, Hilary Term, 1886, had not been complied with.

[12TH JUNE, 1895.]

Doe dem. GILBERT v. NIXON.

Judgment—Ejectment—Practice—57 V. c. 10, s. 20.

The judgment contemplated by 57 V. c. 10, s. 20, where the defendant has failed to enter an appearance within the time appointed, is not a judgment *nisi* at twenty days, but a rule for judgment absolute.

Ex parte LITTLE.

Church—Trial of minister for dishonest or immoral conduct—Ecclesiastical Court—Evidence—Certiorari.

A charge that L., a clergyman of the Church of England, made a false statement, is not an allegation of facts sufficient to make out the offence of dishonesty or immoral conduct on his part.

Where there is no evidence to sustain the charge, and reserving the usual discretion to the Court as to the necessity or expediency of interfering, *certiorari* will lie to remove the finding of an Ecclesiastical Court.

FREEZE v. DOMINION SAFETY FUND LIFE ASSOCIATION.

Life insurance—Action on mutual policy—Pleading—Application—General averment—Sufficiency of mortuary fund—Indorsement on policy—Payment of premiums—Notice.

In an action to recover the amount of a mutual life insurance policy, on demurrer to plaintiff's declaration:—

Held, that it was not necessary to set out the application as part of the contract.

2. That the general averment that all things happened, and all conditions were fulfilled, and all times elapsed necessary to entitle the plaintiff to recover, included the sufficiency of the mortuary fund.

3. *Per* TUCK, HANINGTON, and LANDRY, JJ., BARKER, J., dissenting, that the words in the policy, "constituted as indorsed hereon," made the indorsement on the policy, as to the time and manner of payment of premiums, a part of the policy.

4. That the indorsement on the policy, "All subsequent premiums are payable on the first day of February, May, August, and November in each and every year, of which thirty days' previous notice will be issued," means that such notice must be issued thirty days previous to the quarter days named for payment.

NICKERSON v. COMMERCIAL UNION ASSURANCE
COMPANY.

*Fire insurance—Replication—Waiver—Equitable pleading—Department—
Verbal agreement—Consideration.*

A replication which seeks to vary a written contract of insurance by a verbal agreement, and by which it does not appear that there was any consideration for the alleged waiver, nor that such waiver was subsequent to the date of the policy, is bad.

BANK OF MONTREAL v. SHIRREFF.

*Sheriff—Fees—Poundage—Execution—Levy—Payment independent of
execution.*

To entitle a sheriff to poundage on moneys collected by a judgment creditor, the payment must be the result, directly or indirectly, of a seizure made by him.

Where payments were made to a judgment creditor by makers of promissory notes indorsed by the judgment debtor, in discharge of their own liability and not that of the debtor:—

Held, that, as such payments were independent of the execution, the sheriff was entitled to poundage on them.

Where the sheriff, by the direction and for the better protection of the judgment creditor, made a formal levy on property which the judgment debtor had previously assigned for the benefit of his creditors, and did nothing more, but awaited orders from the judgment creditor, and the assignee of the judgment debtor subsequently paid to the judgment creditor the amount of notes of the debtor upon which the assignee was liable as an indorser, the same being included in the judgment against the debtor:—

Held, per BARKER, HANINGTON, LANDRY, and VANWART, JJ., TUCK, J., dissenting, that the sheriff was not entitled to poundage thereon.

KELLY v. NEW BRUNSWICK R. W. CO.

Deed—Registration—Notice—C. S. N. B. c. 74.

To defeat a registered deed, there must be actual notice or fraud.

BANK OF NOVA SCOTIA v. ROBINSON.

Evidence—Relevancy—Previous transaction—Bona fides—Fraud.

The defendant, for the purpose of supporting his plea of fraud and shewing his *bona fides*, offered in evidence a transaction between himself and the plaintiffs similar to the one in issue, but which had occurred about a year previously.

Held, per HANINGTON, LANDRY, and VANWART, JJ., TUCK, J., dissenting, BARKER, J., *dubitante*, that such evidence was admissible as shewing grounds for the removal of the defendant's suspicions and as a fact from which a reasonable inference might be drawn by the jury bearing upon the question in issue.

***Ex parte* COULTSON.**

Canada Temperance Act—Social club—Selling liquor.

C., the steward of a social club, was summarily convicted of selling liquor to the members thereof, contrary to the provisions of the second part of the Canada Temperance Act. The convicting magistrate found that the club was a *bona fide* club with constitution and by-laws, but also found that it was a device used by the members to evade the provisions of the Canada Temperance Act.

Conviction affirmed.

[22ND JUNE, 1895.]

LOVITT v. SNOWBALL.

Maritime law—Demurrage—Lay days—Duty of charterer—Duty of master—"Usual custom of the wood trade"—Local usage—"As customary"—General custom of port of shipment—Directing verdict under offer and acceptance to suffer judgment by default—Substantial wrong—Evidence.

In an action to recover demurrage, under a charter party, in writing :—

Held, per TUCK, LANDRY, and VANWART, JJ., HANINGTON and BARKER, JJ., dissenting, that the words, "lay days to count when the ship is ready in a proper loading or discharging berth respectively," mean when the vessel is at the port named, has discharged ballast, and the master gives notice to the charterer that he is ready to receive cargo ; whereupon, it is the duty of the charterer, not the master, to provide a proper loading berth.

2. *Per Tuck, J., that the words, "usual custom of the wood trade," mean a custom which is well known to persons generally who are engaged in that business, and not a local usage of which contractors have no knowledge.*

8. *That the words, "cargo to be furnished vessel at port of loading as customary," do not mean the ordinary mode in which the charterer loads vessels chartered by him, but the general custom of the port of shipment.*

4. *That, as no substantial wrong was done the defendant, by the learned Judge at the trial directing a verdict to be entered for the plaintiffs on a count in the declaration, for an amount for which the defendant had offered—and which offer had been accepted—to suffer judgment by default, it was not a ground for new trial.*

5. *Where a witness has given his version of a conversation, in which it was alleged that, for a certain consideration, he had agreed to waive the cessor clause, the question : "Then, so far as you were concerned, you did not agree to waive that?" was properly rejected, inasmuch as it was for the jury to say, upon the evidence already given, whether or not the defendant had waived the cessor clause.*

MANITOBA.

—
In the Queen's Bench.

[TAYLOR, C.J., 26TH SEPTEMBER, 1895.]

WOOD v. GUILLETT.

Security for costs—Plaintiff out of jurisdiction—Real estate within the Province—Court of Appeal in England—Decision of—Authority.

In a suit on the equity side of the Court the defendant obtained an order for security for costs, which the plaintiff moved to discharge, on the ground that he owned property in the Province.

Upon the motion the statement was made that he was the owner of unincumbered real estate worth \$6,000, and of a half interest in other large estates; this was not contradicted.

The defendant relied on *Caston v. Scott*, 1 Man. L. R. 117, as a decision that the ownership of unincumbered real estate within the Province was not sufficient answer to the application for security for costs.

Held, that the order moved against should be discharged, but without costs.

There is the undoubted authority of the Court of Appeal in England that a litigant resident out of the jurisdiction will not be required to give security for costs, if he has within the jurisdiction property available for execution and sufficient to answer every possible claim for costs by the opposite party. If the Court held the possession of goods and chattels sufficient to relieve from giving security, the ownership of unincumbered real estate should be sufficient: *In re Howe Machine Co.*, 41 Ch. D. 125; *In re Apollinaris Co.*, 39 W. R. 309.

In *Trimble v. Hill*, 5 App. Cas. 842, the Judicial Committee of the Privy Council laid it down that a Colonial Court ought to follow a decision of the Court of Appeal in England, because that is a judgment by which all the Courts in England are bound until a contrary determination has been arrived at by the House of Lords.

This was acted upon by the Queen's Bench Division in Ontario in *Hollender v. Ffoulkes*, 26 O. R. 61, where that Court disregarded a decision of the Ontario Court of Appeal and followed a contrary decision of the Court of Appeal in England.

A decision of the Court of Appeal in England should be followed here, even if in doing so that is preferred to a decision of the full Court here.

Wilson, for the plaintiff.

Munson, Q.C., for the defendant.

Supreme Court of Canada.

EXCHEQUER.]

[9TH OCTOBER, 1894.]

CITY OF QUEBEC v. REGINAM.

Crown—Dominion Government—Liability to action for tort—Injury to property on public work—Negligence of Crown's officer or servant—Non-feasance—39 V. c. 27—R. S. C. c. 40, s. 6—50 & 51 V. c. 16.

By s. 16 of 50 & 51 V. c. 16, the Exchequer Court is given jurisdiction to hear and determine, *inter alia* :

(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(d) Every claim against the Crown arising under any law of Canada

In 1877 the Dominion Government became possessed of the property in the city of Quebec on which the citadel is situated. Many years before that, a drain had been constructed through this property by the Imperial authorities, the existence of which was not known to the officers of the Dominion Government, and it was not discovered at an examination of the premises in 1880 by the city engineer of Quebec and others. Before 1877 this drain had become choked up, and the water escaping gradually loosened the earth, until, in 1889, a large portion of rock fell from the cliff into a street of the city below, causing great damage, for which compensation was claimed from the Government.

Held, per TASCHEREAU, GWYNNE, and KING, JJ., affirming the decision of the Exchequer Court, 18 Occ. N. 29, 8 Ex. C. R. 164, that, as the injury to the property of the city did not occur upon a public work, s.-s. (c) above did not make the Crown liable, and moreover there was no evidence that

the injury was caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

Held, per STRONG, C.J., and FOURNIER, J., that while s.-s. (c) did not apply to the case, the city was entitled to relief under s.-s. (d); that the words "any claim against the Crown" in that sub-section, without the additional words, would include a claim for a tort; that the added words "arising under any law of Canada" do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any province of Canada; that this case should be decided according to the law of Quebec regulating the rights and duties of proprietors of land situated on different levels; and that under such law, the Crown, as proprietor of land on the higher level, was bound to keep the drain thereon in good repair, and was not relieved from liability for damage caused by neglect to do so by the ignorance of its officers of the existence of the drain; and that, independently of the statute, the Crown was liable for breach of its duty as owner of the superior heritage.

Pelletier, Q.C., and *Quinn*, Q.C., for the appellant.

Hogg, Q.C., for the respondent.

[11TH MARCH, 1895.]

FILION v. REGINAM.

Negligence—Death of workman on public work—Negligence of servant of Crown—Common employment—Law of Quebec—Liability—50 & 51 V. c. 16, s. 16 (c).

A petition of right was brought by F. to recover damages for the death of his son, caused by the negligence of servants of the Crown while engaged in repairing the Lachine Canal.

Held, affirming the decision of the Exchequer Court, 4 Ex. C. R. 184, L'ASCHEREAU, J., dissenting, that the Crown was liable under 50 & 51 V. c. 16, s. 16 (c); and that it was no answer to the petition to say that the injury was caused by a fellow servant of the deceased, the case being governed by the law of the

Province of Quebec, in which the doctrine of common employment has no place.

Hogg, Q.C., for the appellant.

Monk, Q.C., and *Coderre*, for the respondent.

AWARD OF ARBITRATORS.]

[6TH MAY, 1895.]

DOMINION OF CANADA v. PROVINCES OF ONTARIO
AND QUEBEC.

In re ARBITRATION RESPECTING PROVINCIAL AC-
COUNTS.

Statutes—Construction of—B. N. A. Act, ss. 112, 114, 115, 116, 118—36 V. c. 30 (D.)—47 V. c. 4 (D.)—Provincial subsidies—Half-yearly payments—Deduction of interest.

By s. 111 of the British North America Act, Canada is made liable for the debt of each province existing at the union. By s. 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the Province of Canada at the union over \$62,500,000, and chargeable with five per cent. interest thereon. Sections 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick, exceeding eight and seven millions respectively, and by s. 116, if the debts of those provinces should be less than said amounts, they are entitled to receive, by half-yearly payments in advance, interest at the rate of five per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province, but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the union exceeded the sum mentioned in s. 112.

On appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec :—

Held, affirming the award, that the subsidy to the provinces under s. 118 was payable from the 1st July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that, unless expressly provided, interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance on the excess of debt under s. 118.

By 36 V. c. 80 (D.), passed in 1878, it was declared that the debt of the Province of Canada at the union was then ascertained to be \$78,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 47 V. c. 4, in 1884, it was provided that the accounts between the Dominion and the provinces should be calculated as if the last mentioned Acts had directed that such increase should be allowed from the coming into force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from 1st July, 1867, to 1st January, 1878, with interest at five per cent. from the day on which it would have been so paid, to 1st July, 1884, should be deemed capital owing to the respective provinces, bearing interest at five per cent., and payable after 1st July, 1884, as part of the yearly subsidies.

Held, affirming the award, Gwynne, J., dissenting, that the last mentioned Act did not authorize the Dominion to deduct interest in advance from the subsidies payable to the provinces half-yearly, but left such deduction as it was under the British North America Act.

Ritchie, Q.C., and *Hogg*, Q.C., for the appellant.

Irving, Q.C., and *Moss*, Q.C., for the respondent the Province of Ontario.

Girouard, Q.C., and *Hall*, Q.C., for the respondent the Province of Quebec.

ONTARIO.]

TOWN OF TRENTON v. DYER.

Assessment and taxes—55 V. c. 48, s. 120—Directory or imperative requirement—Municipal corporation—Collection of taxes—Delivery of roll to collector—Certificate of clerk—Bond.

By s. 119 of the Ontario Assessment Act, 55 V. c. 48,

provision is made for the preparation in every year by the clerk of each municipality of a "collector's roll," containing a statement of all assessments to be made for municipal purposes in the year; and s. 120 provides for a similar roll with respect to taxes payable to the treasurer of the Province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first day of October."

Held, affirming the decision of the Court of Appeal, 14 Occ. N. 369, 21 A. R. 879, that the provision as to delivery of the roll to the collector was imperative, and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes.

Held, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous sections, as well as to that for provincial taxes.

Marsh, Q.C., and *Delaney*, for the appellant.

A. Abbott, for the respondent *Dyer*.

Clute, Q.C., and *T. A. O'Rourke*, for the other respondents.

QUEBEC.]

DIONNE v. REGINAM.

Pension—Commutation—Transfer or cession—R. S. P. Q., Arts. 688, 690, 693.

D., a retired employee of the Government of Quebec, surrendered his pension for a lump sum to the Government, and afterwards he and his wife brought an action to have it revived and the surrender cancelled. By Art. 690 of R. S. P. Q., "the pension or half pension is neither transferable nor subject to seizure," and by Art. 693 the wife of D. would have been entitled on his death to an allowance equal to one-half of his pension.

Held, reversing the decision of the Court of Review, *Strong*, C.J., and *Sedgewick*, J., dissenting, that D., after his retirement, was not a permanent official of the Government of Quebec, and the transaction was not, therefore, a resignation by him of office and a return by the Government, under Art. 688, of the amount contributed by him to the pension fund; that the policy of Arts.

685 and 690]is to make the right of a retired official to his pension inalienable even to the Government; that D.'s wife had a vested interest jointly with him during his life in the pension, and could maintain proceedings to conserve it; and therefore that the surrender of the pension should be cancelled.

Burroughs, for the appellant.

Cannon, Q.C., for the respondent.

NORTH-AMERICAN GLASS CO. v. BARSALOU.

Contract—Construction of—Agreement to discontinue business—Determination of agreement.

B., a manufacturer of glassware, entered into a contract with two companies in the same trade, by which, in consideration of certain quarterly payments, he agreed to discontinue his business for five years. The contract provided that if at any time during the five years any furnace should be started by other parties for the manufacture of glassware, either of the said companies could, if it wished, by written notice to B., terminate the agreement "as on the first day on which glass has been made by the said furnace," and the payments to B. should then cease, unless he could show "that such furnace or furnaces at the time said notice was given could not have a production of more than one hundred dollars per day.

Held, affirming the decision of the Court of Review, that under this agreement B. was only required to show that any furnace so started did not have an actual output worth more than \$100 per day on an average for a reasonable period, and that the words "could not have a production of more than one hundred dollars per day" did not mean mere capacity to produce that quantity, whether it was actually produced or not.

Edward Martin, Q.C., and *J. Martin*, for the appellant.

Beique, Q.C., and *Geoffrion*, Q.C., for the respondent.

VILLAGE OF LAPOINTE CLAIRE v. LAPOINTE CLAIRE TURNPIKE ROAD CO.

Municipal corporations—52 V. c. 43—54 V. c. 36—Construction of—Retroactive effect of—Turnpike road company—Erection of toll-gates—Consent of corporation.

A turnpike road company had been in existence for a number of years in the village of Lapointe Claire, and had erected toll-gates and collected tolls therefor, when an Act was passed by the Quebec Legislature, 52 V. c. 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of the Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 V. c. 36. After 52 V. c. 43 was passed, the company shifted one of its toll-gates to a point beyond the limits of the village, which limits were subsequently extended so as to bring said gate within them. The corporation took proceedings against the company, contending that the repeal of s. 2 of 52 V. c. 43 made that Act retroactive, and that the shifting of the toll-gate without the consent of the corporation was a violation of the Act.

Held, affirming the decision of the Court of Queen's Bench, that as a statute is never retroactive unless made so in express terms, s. 2 had no effect, and its repeal could not make it retroactive; that the shifting of the toll-gate was not a violation of the Act, which only applied to the erection of new gates; and that the extension of the limits of the village could not affect the possessory rights of the company.

Geoffrion, Q.C., and Charbonneau, for the appellants.

St. Pierre, Q.C., for the respondents.

[8TH OCTOBER, 1895.]

BARRINGTON v. CITY OF MONTREAL

Appeal—Mandamus—Appeal from Court of Review—Jurisdiction.

B. applied for a mandamus to compel the corporation of the city of Montreal to carry out the provisions of one of its by-laws.

The mandamus was granted by the Superior Court, whose judgment was reversed by the Court of Review, and the petition for mandamus dismissed. B. then instituted an appeal from the latter judgment to the Supreme Court of Canada.

On motion to quash the appeal :—

Held, that the case was not within the provisions of 54 & 55 V. c. 25, s. 4, allowing appeals from the Court of Review in certain cases; and the appeal not coming from the Court of Queen's Bench, the Court of highest resort in the Province, there was no jurisdiction to entertain it.

Dangon v. Marquis, 8 S. C. R. 251, and *McDonald v. Abbott*, *ib.* 278, followed.

Appeal quashed without costs.

Ethier, Q.C., for the motion.

Weir, contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. C. ONTARIO.]

[20TH SEPTEMBER, 1895.]

FIELD v. HART.

Exemptions—Execution—R. S. O. c. 64, s. 2—Bills of sale and chattel mortgages—Description.

An execution debtor can do as he pleases with the statutory exemptions, and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor.

Where in an interpleader issue the claimant alleges that the goods seized include the statutory exemptions, that is a question for trial in the issue and is not to be left to the sheriff to deal with.

Judgment of the County Court of Ontario reversed.

“ One piano, Dominion make, number 2773,” is a sufficient description in a bill of sale.

Judgment of the County Court of Ontario affirmed.

F. J. Travers, for the claimant.

Moss, Q.C., for the execution creditor.

C. C. YORK.]

[25TH SEPTEMBER, 1895.

BROWN v. LENNOX.

Lease — Assignment without consent — Assignee's liability to indemnify assignor.

Where a lease containing a covenant against assignment without the consent of the lessors is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the demised premises, he is bound by his covenant, and is liable, notwithstanding the non-assent of the lessors, to repay to the assignor rent accruing due after the assignment, paid by the assignor to the lessors under threat of legal proceedings.

Judgment of the County Court of York reversed.

E. D. Armour, Q.C., for the appellant.

J. H. Denton, for the respondent.

C. C. WENTWORTH.]

THOMPSON v. GRAND TRUNK RAILWAY COMPANY OF CANADA.

Railways—Highways—Cattle—“ At large ”—51 V. c. 29, s. 271 (D.)—Non-suit—Jury.

Cattle are “ at large ” within the meaning of s. 271 of 51 V. c. 29 (D.) when the herdsman, in following one of the herd that has strayed, gets so far from the main body that he is unable to reach them in time to drive them over a railway crossing when he sees a train approaching.

The question whether cattle are at large or not, need not under all circumstances be submitted to the jury, if the case is being tried before one. The Judge is entitled to hold that there is no evidence that the plaintiff is not within the prohibition of the Act.

Judgment of the County Court of Wentworth affirmed.

D'Arcy Tate, for the appellant.

Moss, Q.C., for the respondents.

High Court of Justice.

CHANCERY DIVISION.

[MEREDITH, C.J., 16TH JULY, 1895.]

TOWNSHIP OF MORRIS v. COUNTY OF HURON.

Statutes—Repeal—Exception—Interpretation Act—55 V. c. 42, s. 533a—57 V. c. 50, s. 14—Municipal corporations—Bridges—Award.

The saving provisions of s. 14 of 57 V. c. 50, which repeals s. 588a of the Consolidated Municipal Act, 55 V. c. 42, do not operate so as by implication necessarily to exclude the application of s. 8, s.-s. 48, of the Interpretation Act, R. S. O. c. 1.

A township corporation which has obtained an award against a county corporation under s. 588a for part of the cost of the maintenance of certain bridges, is, notwithstanding the repeal of s. 583a, entitled to enforce the same up to the date of the passing of the latter Act.

E. L. Dickenson, for the plaintiffs.

Garrow, Q.C., for the defendants.

[18TH JULY, 1895.]

TORONTO GENERAL TRUSTS CO. v. WILSON.

Will—Charitable bequest—Validity of—Discretion of executors.

A testator by his will provided as follows:—"I give and bequeath to my executors out of my pure personalty the sum of

\$10,500 to be paid out by my executors as follows:—\$8,500 to Wycliffe College, \$8,500 to the Bishop of the Diocese of Algoma for the support of missions of the said Diocese, and the balance, to wit, the sum of \$8,500, towards the support of any mission or missions which may be undertaken or established by the Rev. E. F. W., the said Mr. W. having left the Shingwauk Home with the intention of establishing a new mission or missions elsewhere.”

Held, that the bequest for the support of the missions to be undertaken was valid, but was not a bequest to the Rev. E. F. W., and that the executors had a discretion to apply the corpus of the fund so far as it was necessary to resort to it, as well as the income, for the support of the missions.

Moss, Q.C., for the plaintiffs.

J. F. Dumble, for the defendant Wilson.

W. Davidson, for the infants.

IN CHAMBERS.

[MEREDITH, C.J., 17TH JULY, 1895.]

SUMMERFELDT v. JOHNSTON.

Costs—Taxation—Claim and counterclaim.

Where judgment is given for the plaintiff upon his claim with costs, and for the defendant upon his counterclaim with costs, the amounts to be set off, the costs should be taxed so as to allow the plaintiff the costs on his claim as though he had wholly succeeded in the suit, and the defendant the costs of the counterclaim as though he had wholly succeeded in the suit.

Day, for the plaintiff.

W. H. McFadden, for the defendant.

[ROSE, J., 31ST AUGUST, 1895.]

REGINA v. COURSEY.

Public Health Act—R. S. O. c. 205, s. 112—Conviction under by-law in schedule—Right of appeal—Prohibition.

Where there is a summary conviction for an offence against

the by-law set out in schedule A. to the Public Health Act, R. S. O. c. 205, as distinguished from a conviction under any of the provisions in the Act itself, an appeal will lie from such conviction to the Quarter Sessions, notwithstanding s. 112, which has no application.

Prohibition refused.

Shepley, Q.C., for the applicants.

Aylesworth, Q.C., for the defendants.

[THE MASTER IN CHAMBERS, 2ND OCTOBER, 1895.]

YOUNG v. ERIE AND HURON R. W. CO.

Particulars—Demand—Compliance—Restriction.

Where a party complies with a demand for particulars of his claim, he will be restricted at the trial to the particulars given by him, without any order for the purpose.

Masten, for the plaintiff.

W. H. Blake, for the defendants.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 24TH SEPTEMBER, 1895.]

RURAL MUNICIPALITY OF SPRINGFIELD v. R. C.
EPISCOPAL CORPORATION OF ST. BONIFACE.

Assessment and taxes—Question of exemption—Contract—Municipal corporation.

This bill was filed for payment of taxes alleged to be due to the plaintiffs, and for a declaration that the lands in question were subject to taxation.

The defendants were patentees and owners of certain lands in the municipality of St. Boniface, which was incorporated in 1880. In November, 1882, the defendants entered into an agreement with the municipality of St. Boniface to sell to the municipality certain lots, the consideration being one dollar and the complete, entire, and absolute exemption of all taxes, statute labour, contribution of any kind, or municipal charge whatsoever, in favour of the defendants, for a period of twenty years, from 1881 to 1900 inclusive, on all real and personal property belonging to the defendants in the actual limits of the municipality, and which would not be rented, or from which the defendants would derive no annual revenue.

In 1883 the town of St. Boniface was incorporated as a municipality, and took with it as such municipality a portion of the territory formerly covered by the original municipality of St. Boniface. Subsequently, by an Act of the Legislature, certain sections were transferred from the municipality of St. Boniface to the plaintiffs' municipality, part of which sections were owned by the defendants. After the transfer the plaintiffs assessed the lands belonging to the defendants for taxes; but the defendants disputed the plaintiffs' right to recover for the same, contending that they were exempt under the agreement made with the old municipality of St. Boniface, except as to school rates, which had been tendered to the plaintiffs, but not accepted.

Held, that this was not properly a case of exemption from taxation. It was a case of a contract under which the defendants paid in advance the taxes, for a term of years, upon certain property, and the ordinary rules by which a contract is to be construed should be applied to it. The plaintiffs were entitled to a decree for payment of the part of the taxes as to which liability was admitted by the defendants, without interest, as they were tendered by the defendants and payment refused.

The defendants were entitled to a declaration that, except as to the admitted part, the lands in question were not liable to taxation for the period and on the terms set out in the agreement.

The defendants were entitled to their costs, to be set off *pro tanto* against the amount due by them.

Howell, Q.C., and *Munroe*, for the plaintiffs.

Ewart,¹Q.C., for the defendants.

NORTH-WEST TERRITORIES**In the Supreme Court.**

[THE JUDGES IN BANCO, 18TH JUNE, 1895.]

MCCARTHY v. BARTER.

Malicious prosecution—Application to strike name of advocate off roll—Action for malicious prosecution of—Abuse of process of Court—Summary dismissal—Jurisdiction—Reasonable and probable cause.

An appeal by the defendants from the order of Scott, J., *ante* p. 198, refusing the application of the defendants for an order dismissing the action on the ground that it was frivolous or vexatious.

The action was brought by an advocate of the Supreme Court of the North-West Territories against Lizzie M. Barter, a former client of the plaintiff, and her father, Jeremiah Travis, also an advocate, for conspiring to procure and procuring an application to be made maliciously and without reasonable and probable cause to strike the plaintiff off the roll of advocates, etc.

The judgment of the full Court was delivered by WETMORE, J.

Held, that the Court had inherent jurisdiction to order the dismissal of the action as being an abuse of its process.

Metropolitan Bank v. Pooley, 10 App. Cas. 210, and *Lawrence v. Norreys*, 15 App. Cas. 219, followed.

Assuming that an action for malicious prosecution of an application to strike an advocate off the roll will lie, and that the effect of the judgment of the full Court upon that application was to set aside the order of McGUIRE, J., and so to determine the application favourably to the plaintiff, yet the action was so groundless that no reasonable person could possibly expect to obtain relief in it; for it could not possibly be held that there was no reasonable or probable cause for making and pressing the application against the plaintiff, nor could there be any question of want of reasonable and probable cause to leave to a jury.

The case was therefore one in which the jurisdiction to summarily dismiss the action should be exercised.

Decision of Scott, J., *ante* p. 198, reversed.

C. C. McCaul, Q.C., for the defendant Barter.

Jeremiah Travis, a defendant, in person.

P. McCarthy, Q.C., the plaintiff, in person.

WILKIE v. JELLETT.

Registry laws—Territories Real Property Act—Execution—Unregistered transfer—Priorities.

An execution against lands, duly delivered to the registrar, is not binding as against a prior but unregistered transfer for value to a *bona fide* purchaser.

An appeal by the plaintiffs from the judgment of a single Judge in favour of the defendants.

N. D. Beck, Q.C., for the appellants.

S. S. Taylor, Q.C., for the respondents.

The judgment of the Court was delivered by

McGUIRE, J.—The question of law to be decided in this case is simply this: Is an execution against lands, duly delivered to the registrar, binding as against a prior but unregistered transfer for value to a *bona fide* purchaser? By s. 94 such a transfer can be registered subsequent to the coming in of the execution; but the registrar would, in issuing a certificate of title to the transferee, express thereon that it was subject to the execution. A transferee taking such a certificate would not be practically affected unless and until a sale had been made by the sheriff and duly confirmed by a Judge, for, by s. 96, no such sale “shall be of any effect until the same has been confirmed by a Judge;” and it is only, if at all, upon the production to the registrar of a duly executed transfer, having indorsed thereon an order of confirmation, that the purchaser is “entitled to be registered as owner and to a certificate of title to the same.” So it would seem that the holder of such a transfer, on receiving a certificate expressed to be subject to an execution, might not, by accepting such a certificate, be barred from contesting the right of the transferee from the sheriff to a confirmation of the sale, or his right to be registered thereunder as the owner. However that may be, it is obvious that if the holder of the prior transfer is not affected by the delivery to the registrar of the execution, he may rightly decline to accept a certificate subject thereto, and may come at once to the Court to have the execution removed from the register as being a cloud upon his title.

It is clear, I think that the receipt by the registrar of a copy of an execution against lands does not pass any title or any

interest in the land. Certainly not to the execution creditor, for otherwise it might have been necessary for such creditor to join in the transfer to the purchaser at the sheriff's sale; not to the sheriff, and not to the purchaser from the sheriff, because, at the time of delivery to the registrar, the person who may become purchaser is unascertained. So that one is not surprised to find s. 94 declaring that the execution "shall operate as a caveat," etc.

Let us now consider what is the effect of such an execution as against a prior *bona fide* purchaser for value who has omitted to register his transfer. It is contended by the execution creditor that, so long as the certificate of title of the judgment debtor is in force and is uncanceled, the land mentioned therein must be deemed, as against the whole world, including persons interested under unregistered instruments, the property absolutely of the person named therein, subject only to certain matters set out in ss. 60, 61, and 62, one class of which is "executions against or affecting the interest of the registered owner in such land, which have been registered and maintained in force against such registered owner:" s. 61 (e). Section 59 is read as showing that the transfer; "until registered" shall not be "effectual to pass any estate or interest in any land," and that the result is that the land still remained, at the date of the delivery of the execution to the registrar, the property of the judgment debtor, and so liable to satisfy the execution.

That seems to have been the view pretty generally accepted through the Territories and in Manitoba.

[The learned Judge then referred to and discussed *Re Herbert and Gibson*, 6 Man. L. R. 191; *Re Massey and Gibson*, 7 Man. L. R. 172; *In re Angus Thompson*, 10 Occ. N. 44; and continued:]

No doubt the language of s. 59 seems to be very strong and to permit no effect whatever to instruments until registered. Section 62 seems very emphatic that, so long as the certificate of title is in force and uncanceled, it is conclusive evidence that the person therein named is entitled to the estate or interest mentioned, subject only to exceptions not affecting an unregistered instrument. One must not forget, however, that the Act is largely framed for the guidance of the registrar, and that, so far as that officer is concerned, the meaning of the Act is that he

shall regard only instruments such as he is directed to receive or register, when substantially in accordance with the provisions of the Act, and when brought in and presented for registration, and that the positive language employed was not intended to prevent a Court from giving effect to rights, equitable or otherwise, whether evidenced by any instrument, or by one not capable of being registered, or by one which has by mere omission not been registered. Before giving to ss. 59 and 62 the meaning contended for by the respondents, we must see what the logical consequence would be ; if that would lead to a palpably absurd conclusion, such as it could not be conceived the framers of the Act could have intended, we must then return and consider whether the language of those sections is not capable of an interpretation which would not lead to such a conclusion.

The Act provides for a person having no beneficial interest in land being registered as owner ; for example, s. 91 allows the personal representative of a deceased owner of land to apply for and obtain a certificate to himself of such land ; by s.-s. 2 he is thereupon "deemed to be the owner." Now then, for purposes of registration, doubtless, he would be treated as the owner, so that if he executed a transfer or mortgage it would be registered exactly as if he were the absolute beneficial owner. But it would surely not be contended for a moment that if an executor contemplated dealing with the land contrary to the interest of the devisee, the latter could not by injunction or order restrain him from so doing. Yet, if, literally, as against all persons whomsoever, he is to be deemed the owner, how could he be interfered with ? It will not do to say that the only remedy of the devisee is to bring an action for damages against him ; such a remedy might be a very empty one. Or will it be said that the execution creditors of such an executor could by delivering their executions to the registrar reach this land ? Yet, if the respondents' contention is right, since the executor is to be deemed the owner, and his certificate, if still in force, is to be conclusive evidence of his ownership, and the execution when delivered binds whatsoever land he owns, how could the result be otherwise than that such lands would be taken to satisfy the executor's debts ? Possibly, if the person beneficially interested did not intervene, and there was a sale by the sheriff, and the transfer to the purchaser was confirmed by a Judge, and then presented to the registrar, and a certificate were issued to the

purchaser, the title of the latter might become absolute. This, I think, illustrates how the apparently general words of ss. 59 and 62 may be given effect to as being addressed to the registrar, and are to be observed by him so far as he is concerned in the performance of his duties. I do not mean to say that they have no further effect, but I cannot accept the proposition that a Court exercising equitable jurisdiction is powerless, when confronted with a certificate, to question the ownership therein set forth, notwithstanding s. 62. But I find that s. 130 expressly provides that "nothing contained in this Act shall take away or affect the jurisdiction of any competent Court on the ground of actual fraud, or over contracts for the sale or other disposition of land, or over equitable interests therein."

I find also that there are many sections which would be needless if ss. 59 and 62 had the wide meaning attempted to be given them. For example, s. 64 provides that, as against a *bona fide* transferee, no instrument shall be effectual unless two conditions are complied with: first, that it be executed in accordance with this Act, but s. 34 had already provided that no instrument could be registered unless it was substantially in accordance with the provisions of the Act; and, second, that it be "duly registered," *i.e.*, if not duly registered, it shall not be effectual against a *bona fide* transferee; but the respondents say the effect of s. 59 is that, if not duly registered, it is not effectual as against anybody, whether he is a *bona fide* transferee or not. Section 64 leaves us to infer that an unregistered instrument may be effectual against a person other than a *bona fide* transferee. An execution creditor, *quoad* his execution in the registrar's hands, is not a *bona fide* transferee. Again, s. 126 seems to make provision for the protection of persons who would be perfectly safe without this section, if s. 62 is as absolute as it appears to be; but we here find that the persons in the case there mentioned are protected, "any rule of law or equity to the contrary notwithstanding."

Considering now the particular case of an execution delivered to the registrar; it is unquestioned law that an execution affects only the debtor's interest in the property, and by this interest is meant an interest in lands over which the debtor might have a disposing power, for his own benefit, without committing a breach of duty, *i.e.*, over which he had a right at law and equity to consider himself the beneficial owner.

[Reference to *Kinderley v. Jervis*, 22 Beav. 1 ; *Watts v. Porter*, 8 E. & B. 748 ; Bacon's Abr., vol. 8, p. 865.]

Under the former law, when lands could only be conveyed by deed, if the instrument purporting to convey was not under seal, the legal estate did not pass to the vendee, and at law the vendor was deemed the owner, just as, under s. 62, the person named in the uncanceled certificate of title is to be deemed the owner ; yet Courts of equity treated the purchaser as the real owner.

[Reference to *Parke v. Riley*, 12 Gr. 69, and *Morton v. Cowan*, 25 O. R. 529.]

There is another view of the case which may be considered in deciding whether the execution affects the equitable title of a prior purchaser. Section 94 says the execution shall operate as a caveat against the transfer by the owner of the land, etc. But can a vendor in such a case as the present be said to be the "owner?"

[Reference to Bacon's Abr., vol. 8, p. 865 ; *Roach v. McLachlan*, 19 A. R. at p. 501 ; *Breithaupt v. Marr*, 20 A. R. 689.]

Section 62 of the Territories Real Property Act, it is true, says that the land in a certificate of title shall impliedly be subject, among other things, to an execution "against or affecting the interest of the registered owner in the land," which execution has been registered and kept alive. But where the "registered owner," that is, the person who appears, so far as the register shows, to be the "owner," has become a mere trustee for some one else, who is the real, the beneficial owner, is the execution in such a case one which "is against or affects the interest of the registered owner," since he has at the time no interest in the land? If the execution affects the land at all, it does so to the prejudice of the purchaser ; and he alone, not the registered owner, would be concerned. In the view already taken, however, it is not necessary to decide whether this latter view of the matter would alone dispose of the respondents' claims.

As to the defendant Robertson, the deputy sheriff, I think he was a proper party.

As to damages, I think the plaintiffs have suffered none which will not be sufficiently compensated with the costs.

I think this appeal should be allowed with costs to the plaintiffs both of the appeal and in the Court below, and it should be declared that the executions registered are clouds on the titles of the plaintiffs, and the registrar should be ordered to cancel and remove from the register of the lands in question the entries made by him of the executions, and the deputy sheriff enjoined from selling under the executions.

NORTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., 21ST SEPTEMBER, 1895.]

MACDONALD v. DUNLOP.

Parties—Action to set aside fraudulent conveyance—Judgment debtor.

Action by judgment creditors of the defendant Alexander Dunlop, with registered executions, to set aside a conveyance by that defendant to his co-defendant, his wife. The plaintiffs claimed, *inter alia*, a judgment vesting the lands in the judgment debtor; but otherwise asked no relief against him.

He moved to have his name struck out as an unnecessary and improper party.

Held, following *Weise v. Wardell*, L. R. 19 Eq. 171, and distinguishing *Gibbons v. Darvill*, 12 P. R. 478, that the judgment debtor was an improper party.

In cases like the present, where the plaintiffs have already obtained judgment and execution, there is no reason why the judgment debtor should be made a party where no relief is claimed against him. The mere fact of his participating in the fraud is not a sufficient ground for adding him as a party for the purpose of rendering him liable for the costs of the action.

S. S. Taylor, Q.C., for the plaintiffs.

C. C. McCaul, for the defendant Alexander Dunlop.

[25TH SEPTEMBER, 1895.]

CHAVE v. HÉTU.

Summary judgment—C. J. O., s. 96—Liquidated debt—Partnership—Taking accounts—Plausible defence.

The plaintiff applies under s. 96 of the Civil Justice Ordinance to strike out the defendant's appearance and for leave to enter judgment for the amount claimed. The plaintiff and defendant were in partnership. In their articles of partnership the defendant acknowledged his indebtedness to the plaintiff in respect of the claim sued upon, but it was therein stipulated that the plaintiff should have the right "to take in advance, out of the first net profits of the partnership," the amount of such claim, "being careful always, as far as possible, to do so without injury to the affairs of the partnership."

The plaintiff said in an affidavit that the defendant had never paid the claim, or any part thereof, and still owed the whole amount.

The defendant showed by his affidavit that in the partnership books he was debited, and the plaintiff was credited, with the amount of this claim, or nearly the whole amount thereof, that the accounts of each partner extended over several pages, and contained items both of debits and credits; that, in his belief, there were several important errors in the accounts of both partners, as they appeared therein, against him and in favour of the plaintiff; that a correct statement of the accounts of the partners, even as several and individual accounts with the firm, could not be made without a careful investigation of each item by a competent person; and that if the profits drawn by the plaintiff from the business should be appropriated against the claim, it would be largely reduced.

S. S. Taylor, Q.C., for the plaintiff.

C. C. McCaul, Q.C., for the defendant.

SCOTT, J.—Apart from any question that may arise as to the entries in the partnership books constituting this claim a partnership transaction, I think that the defendant's contention that the profits received by the plaintiff should be applied by him in reduction of his claim, is not an unreasonable one, and suggests

a plausible defence to, at least, a portion of the claim. I therefore think that I should not strike out his appearance.

The summons will be discharged and costs of the application reserved until after the trial.

[2ND OCTOBER, 1895.]

McLAREN v. McLAREN.

Particulars—Time—Close of pleadings—C. J. O., ss. 88, 89.

The plaintiff, wife of the defendant, instituted proceedings for recovery of \$115.70, alleged to have been lent by her to her husband in 1892.

The defence was filed on the 10th June, 1895, denying the debt and alleging that the money was spent as the wife's agent. On the 22nd June the plaintiff served a demand for particulars of the alleged payments with dates and items. The demand not having been complied with, the plaintiff obtained a summons for particulars.

Counsel for the defendant contended that the pleadings being closed (Civil Justice Ordinance, ss. 88, 89), the plaintiff was too late in moving, and that the order should not be granted.

Held, that the application was made in time.

Order granted.

J. W. Greene, for the plaintiff.

W. B. Osbourn, for the defendant.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., 30TH SEPTEMBER, 1895.]

CRAIG v. NEW OXLEY RANCHE COMPANY.

Costs—Taxation—Review—Items—Ex parte order to examine—Affidavit on production—Abortive proceedings—Subpoenas—Costs of review.

Review by the plaintiff of the taxation of the defendants' costs.

1. Costs of order for examination of one Hill *de bene esse* objected to on the ground that the order was obtained *ex parte* and was therefore irregular.

Objection overruled, as it was shown that no application was made to set aside the order, and the plaintiff's advocate attended upon the examination.

5. Costs of affidavit on production objected to on the ground that the affidavit was insufficient, and false, misleading, and fraudulent.

Objection overruled, for, although the affidavit was insufficient, it appeared that the plaintiff's application for a better one was dismissed with costs, and he did not appeal.

6. Costs of order to examine the plaintiff at Maple Creek objected to on the ground that it was issued *ex parte* and without notice, contrary to the terms of an agreement between the advocates for the parties; that it was abortive and without result, etc.

Objection overruled, the plaintiff having applied to set the order aside and his application having been dismissed with costs. All the objections, except that the proceeding was abortive, could have been taken and disposed of on that application. The proceeding appeared to have been abortive because the plaintiff did not attend, though duly called upon.

7. The defendants' counsel admitted that certain proceedings objected to were unnecessary under s. 319 of the Civil Justice Ordinance. The objection was therefore allowed and the items in question disallowed.

10.* Costs of two subpoenas, each for one person, objected to. The taxing officer found that two were necessary, one for service south and one for service north of Macleod.

English Rule 511 provides that every subpoena, other than a subpoena *duces tecum*, shall contain three names where necessary or required, but may contain any larger number of names.

Held, that this Rule means that a party may issue one subpoena for each three witnesses; but where witnesses reside in different parts of the country and the same original cannot reasonably be produced to them all, as required by the English Rule 514, the clerk may, in his discretion, allow for extra subpoenas.

Objection overruled.

The defendants were allowed costs of the review, except as to the 7th objection, as to which the plaintiff was allowed costs. In view of the difficulty of apportionment, a lump sum of \$15 was allowed to the defendants.

C. F. Harris, for the plaintiff.

C. C. McCaul, Q.C., for the defendants.

ALISON v. CHRISTIE.

Costs—Scale of—Amount in controversy—Taxation—Review—Items—Instructions—Advocate's fees—Discretion of clerk—Appeal—Affidavit on production—Order for payment of costs—Subpoena—Costs of review.

Review by the defendant of the taxation of the plaintiffs' costs.

1. The whole bill was objected to on the ground that the costs should be taxed as of an action under \$100, or at least on the lower scale.

The action was for the detention of a horse, of the value, as alleged in the statement of claim and sworn in an affidavit upon which a writ of replevin issued, of \$1,000.

The plaintiffs obtained judgment for the return of the horse with \$10 damages for its detention.

At the trial the only evidence as to value was that the horse was not well when it was delivered to the defendant some months before the action was brought, and that it died shortly after being replevied.

Held, that, in the absence of further evidence contradicting the allegation as to value contained in the affidavit, the value there stated should be treated as the real value for the purpose of taxation of costs.

Objection overruled.

2. Instructions for affidavit for writ of replevin objected to because not a special affidavit.

Objection overruled.

3. Advocate's fees on writ of summons and writ of replevin objected to.

Objection overruled, as the tariff shows in the plainest manner that these fees should be allowed.

4. Instructions to obtain order for production of documents objected to.

Objection allowed. By item 15 of the tariff, the allowance is in the discretion of the clerk or a Judge; a Judge cannot exercise his discretion except by way of appeal from the ruling of the clerk; and therefore the discretion exercised by the clerk is open to review by a Judge. Such a step in the action is not of sufficient importance to warrant a charge for instructions.

5. Two affidavits on production, one by each plaintiff, objected to because both could have joined in one. The plaintiffs resided in different parts of the country. It appeared that both were sworn at Macleod, but on different days. It was not shown that they were present at Macleod on the same day.

Held, that it was not unreasonable to allow for an affidavit made by each.

Objection overruled.

6. Issuing of order for payment of costs objected to as unnecessary. The defendant obtained leave to amend the defence on terms of postponement of trial and payment of the plaintiffs' costs of the day. The defendant took out no order and did not pay the plaintiffs' costs. Thereupon the plaintiffs took out an order for payment of costs.

Objection overruled.

8. Costs of subpoena issued by the plaintiff Alison, for the purpose of calling his co-plaintiff as a witness, objected to as not taxable against the defendant. At the time of the trial the two plaintiffs were represented by different advocates on the record.

Held, that Alison was reasonably justified in issuing a subpoena to procure the attendance of his co-plaintiff as a witness.

Objection overruled.

The plaintiffs, having succeeded upon seven out of eight objections, were allowed a lump sum of \$10 as costs of the review.

C. F. Harris, for the defendant.

C. C. McCaul, Q.C., for the plaintiffs.

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LONDON v. GLASS.

Costs—Scale of—Claim and counterclaim—Special circumstances—Order of Judge as to costs.

Motion by the plaintiff for an order to tax his costs of the

action on the lower scale up to the filing of the defendant's counterclaim, and on the higher scale thereafter.

The plaintiff sued for \$222, the price of hay delivered, and gave credit in his particulars for \$119, claiming a balance of \$103.

The defendant pleaded payment of this balance, and also counterclaimed for \$272.15 for the breach by the plaintiff of an agreement to deliver other hay.

At the trial the plaintiff showed that he was entitled to \$217.78 for hay delivered, and, after deducting the credit of \$119, obtained judgment for \$98.78.

The defendant failed to establish his counterclaim, and the plaintiff obtained judgment upon it.

The defendant under his plea of payment showed that he was only entitled to credit for \$99.96, instead of \$119, but it was held at the trial that the plaintiff was bound by the credit of the latter amount in his particulars.

C. C. McCaul, Q.C., for the plaintiff.

C. F. Harris, for the defendant.

SCOTT, J.—By clause 95 of the tariff the plaintiff would be entitled to tax costs on the higher scale after the filing of the counterclaim, unless s. 45 of Ordinance No. 5 of 1894 will prevail in cases falling within that section.

But s. 45 gives a Judge power to order that its provisions shall not apply.

I doubt whether I should interfere in ordinary cases, but there are special circumstances in this case which, I think, justify me in so interfering.

I was satisfied at the trial that the plaintiff had, by mistake, given credit for a larger amount than he had received, and that, but for his mistake, he would have recovered more than \$100.

I felt that I could not relieve him from his mistake by reducing the amount of his credit. I think I should do so in the matter of costs.

I therefore direct that the plaintiff shall be entitled to tax his costs of the action on the lower scale of the tariff, and his costs of the counterclaim on the higher scale, and that the defendant shall not be entitled to set off costs against the plaintiff.

Supreme Court of Canada.

ONTARIO.]

[6TH MAY, 1895.

LEWIS v. ALEXANDER.

Municipal corporations—Added territory—Petition for drain—Use of drain as common sewer—Connection with drain—Nuisance—Liability of householder.

Ratepayers of a township petitioned, under s. 570 of the Municipal Act of Ontario, for a drain to be constructed "for draining the property" described in the petition. The township was afterwards annexed to the adjoining city, and the drain was thereafter used as a common sewer, it being as constructed fit for such use. An action was brought against a householder, who had connected the sewage from his house with the drain, to recover damages for a nuisance resulting therefrom at its outlet.

Held, affirming the decision of the Court of Appeal, 21 A. R. 613, 14 Occ. N. 499, TASCHEREAU and GWYNNE, JJ., dissenting, that s. 570 empowered the township to construct a drain not only for draining off surface water but sewage generally, and the householder was not responsible for the consequences of connecting his house with the drain by permission of the city.

Held, also, that where a by-law provided that no connection should be made with a sewer except by permission of the city engineer, a resolution of the city council granting an application for such connection, on terms which were complied with and the connection made, was a sufficient compliance with the by-law.

McCarthy, Q.C., and *M. D. Fraser*, for the appellants.

Gibbons, Q.C., and *E. R. Cameron*, for the respondents.

TORONTO RAILWAY CO. v. CITY OF TORONTO.

Negligence—Municipal corporations—Obstruction of street—Accumulation of snow—Question of fact—Finding of jury.

An action was brought against the corporation of the city of Toronto to recover damages for injuries incurred by reason of snow having been piled on the side of the streets, and the Toronto Railway Company were brought in as third parties. The evidence was that the snow from the railway tracks was piled upon the roadway, and that from the sidewalks was placed there also. The jury found that the disrepair of the street was the act of the company, who were therefore made liable over to the city for the damages assessed. The company contended on appeal that the verdict was perverse and contrary to evidence.

Held, affirming the decision of the Court of Appeal, that under the evidence given of the manner in which the snow from the track had been placed on the roadway immediately adjoining, the jury might reasonably be of opinion that if it had not been so placed there, the accident would not have happened, and therefore the verdict was not perverse.

Laidlaw, Q.C., and J. Bicknell, for the appellants.

Fullerton, Q.C., for the respondents.

GRANT v. NORTHERN PACIFIC JUNCTION R. W. CO.

Railways—Carriers—Carriage of goods over connecting lines—Contract for—Misdelivery of goods—Principal and agent—Consignor and consignee.

E., in British Columbia, being about to purchase goods from G. in Ontario, signed, on request of the freight agent of the defendants in British Columbia, a letter to G. asking him to ship goods via Grand Trunk Railway and Chicago and North-Western Railway, care of the defendants at St. Paul's. This letter was forwarded to the freight agent of the defendants at Toronto, who sent it to G. and wrote him, "I enclose you card of advice, and if you will kindly fill it up and when you make the shipment send it to me, I will trace and hurry them through and advise you of delivery to consignee." G. shipped the goods as suggested in this letter, deliverable to his own order in British Columbia.

Held, affirming the decision of the Court of Appeal, 21 A. R. 822, 14 Occ. N. 865, that on the arrival of the goods at St. Paul's the defendants were bound to accept delivery of them for carriage to British Columbia, and to expedite such carriage; that they were in the care of the defendants from St. Paul's to British Columbia; that the freight agent at Toronto had authority so to bind the defendants; and that the defendants were liable to G. for the value of the goods, which were delivered to E. at British Columbia without an order from G., and not paid for.

MacGregor, for the appellants.

T. Wells and *W. Nesbitt*, for the respondents.

GRINSTED v. TORONTO RAILWAY CO.

Damages—Remoteness—Expulsion from street car—Exposure to cold—Consequent illness.

In an action by G. against a street railway company for damages in consequence of being wrongfully ejected from a street car, the evidence was that G. had paid his fare and been transferred to the car from which he was ejected; that he was in a state of perspiration from his altercation with the conductor, and had to wait twenty minutes for another car; and that, the weather being severe, he caught cold and was laid up for some time with bronchitis and rheumatism. His medical attendant testified that when he left the car his physical condition was such as would make him liable to contract the illness which ensued. The jury gave a verdict for G., severing the damages, allowing \$200 for the ejectment and \$300 for the illness, finding that it was a natural and probable result of the ejectment. The company appealed from the assessment of \$300.

Held, affirming the decision of the Court of Appeal, 21 A. R. 578, 14 Occ. N. 496, Gwynne, J., dissenting, that under the circumstances the jury were justified in finding that the illness was the natural and probable result of the ejectment and that the cause of damage was not too remote.

J. Bicknell, for the appellants.

W. J. McWhinney, for the respondent.

GOSNELL v. TORONTO RAILWAY CO.

Negligence—Street railway—Management of car—Excessive speed—Contributory negligence.

G., while driving a coal cart along one of the streets of Toronto, started to cross a street railway track, but before getting across the cart was struck by a car coming along the track, and G. was thrown out and injured. In an action against the street railway company for damages, the evidence was that G. did not look to see if a car was coming before going on the track; that, when he went on, the car coming was 70 or 80 feet away; and that it was going at an excessive rate of speed. A verdict for G. was sustained by a Divisional Court and the Court of Appeal.

Held, affirming the decision of the Court of Appeal, 21 A. R. 553, 14 Occ. N. 418, Gwynne, J., dissenting, that the verdict should stand; that persons crossing the tracks had a right to rely on the cars being driven moderately and prudently, and, if not so driven, the company were responsible for injury resulting therefrom; and that G. was not guilty of contributory negligence, for if he had looked he would have seen that he had time to cross, assuming that the car was going at a moderate rate of speed, and he should not be in a worse position by not looking than he would have been otherwise.

Osler, Q.C., and Laidlaw, Q.C., for the appellants.

Fullerton, Q.C., for the respondent.

O'CONNOR v. HAMILTON BRIDGE CO.

Negligence — Use of dangerous machinery — Absence of guard — Orders superior—Reasonable care—Factories Act—Workmen's Compensation Act.

O. was employed in a factory for the purpose of heating rivets, and one morning, with another workman, he was engaged in oiling the gearing, etc., of the machinery which worked the drill in which the rivets were made. Having oiled a part, the other workman went away for a time, during which O. saw that the oil was running off the horizontal shaft of the drill, and called the attention of the foreman of the machine shop to it

and to the fact that the shaft was full of ice. The foreman said to him "run her up and down a few times and it will thaw her off." The shaft was seven feet from the floor, and on it was what is called a buggy, which could be moved along it on wheels. Depending from the buggy was a straight iron rod, into the hollow end of which was inserted the drill secured by a screw, and attached to the buggy was a lever over six feet long. O., when so directed by the foreman, tried to move the buggy by means of the lever, but found he could not. He then went round to the back of the spindle, and, not being able then to move the buggy, came round to the front, put his two hands upon a jacket around the spindle, and put the weight of his body against it; it then moved, and he stepped forward to recover his balance, when the screw securing the drill caught him about the middle of the body and he was seriously injured. In an action against his employers for damages it was shown that O. had no experience in the mode of moving the buggy; that the screw could have been guarded; and that the mode adopted by O. was a proper one.

Held, affirming the decision of the Court of Appeal, 21 A. R. 596, 14 Occ. N. 495, and of the Common Pleas Divisional Court, 25 O. R. 12, 14 Occ. N. 217, Gwynne, J., dissenting, that the jury were warranted in finding that there was negligence in not having the screw guarded; that, as the foreman knew that O. had no experience as to the ordinary mode of doing what he was told, he was justified in using any reasonable mode; that he acted within his instructions in using the only efficient means that he could; and that under the evidence he used ordinary care.

Bruce, Q.C., for the appellants.

Lynch-Staunton, for the respondents.

QUEBEC.]

LABERGE v. EQUITABLE LIFE ASSURANCE SOCIETY.

Contract—Insurance company—Appointment of medical examiner—Breach of contract—Authority of agent.

The medical staff of the defendants at Montreal consisted of a medical referee, a chief medical examiner, and two or more

alternate medical examiners. In 1888 the plaintiff was appointed an alternate examiner, in pursuance of a suggestion to the manager by local agents that it was advisable to have a French-Canadian on the staff. By his commission the plaintiff was entitled to the privilege of such examinations as should be assigned to him by, or required during the absence, disability, or unavailability of, the chief examiner. After L. had served for four years it was found that his methods in holding examinations were not acceptable to applicants and he was requested to resign, which he refused to do, and another French-Canadian was appointed as an additional alternate examiner, and most of the applicants thereafter went to the latter. The plaintiff then brought this action against the defendants for damages, claiming that on his appointment the general manager had promised him all the examinations of French-Canadian applicants for insurance. He also alleged that he had been induced to insure his own life with the company on the understanding that the examination fees would be more than sufficient to pay the premiums, and he asked for repayment of amounts paid by him for such insurance.

Held, affirming the decision of the Court of Queen's Bench, Q. R. 8 Q. B. 512, which reversed the judgment of the Superior Court, Q. R. 3 S. C. 884, that, by the contract made with the plaintiff, the defendants were only to send him such cases as they saw fit, and could dismiss him or appoint other examiners at their pleasure; that the manager had no authority to contract with the plaintiff for any employment other than that specified in his commission; and that he had no right of action for repayment of his premiums, it being no condition of his employment that he should insure his life, and there being no connection between the contract for insurance and that for employment.

Greenshields, Q.C., for the appellant.

MacMaster, Q.C., for the respondents.

NEW BRUNSWICK.]

[31st OCTOBER, 1895.]

MERRITT v. HEPENSTAL.

Negligence—Master and servant—Contributory negligence—Admission of evidence.

M., a grocer, sent out a man in his employ with a horse and

waggon to deliver parcels. After delivering all but one, the man went to his supper, after which, without returning to the place where he had been before starting for home, he proceeded to deliver the remaining parcel some two or three blocks distant therefrom, and on his way a child was struck by the wheel of his waggon and seriously injured. In an action by the father of the child against M., evidence was admitted, subject to objection, of the nurse who attended the child, to the effect that, in her opinion, a urinary trouble from which the child suffered was the result of the accident. The medical attendant testified that such trouble might have been caused by the accident, but that it was a very common thing with children. The Judge who tried the case without a jury gave judgment for the plaintiff with \$250 general damages and \$50 damages for the urinary trouble. A verdict for the defendant or a new trial was moved for on the grounds that there was contributory negligence; that when the accident occurred the driver had not returned to his master's employment; that the evidence of the nurse was improperly admitted; and that there was no evidence to justify the \$50 assessed as special damages. The judgment of the trial Judge having been sustained by the full Court:—

Held, affirming the decision of the Supreme Court of New Brunswick, that the servant of M., having one parcel to deliver after his supper, resumed his master's employment as soon as he started for the purpose and with the intention of delivering it, and consequently was on his master's business when the accident happened; that the evidence showed negligence on the part of the servant in not looking out for persons in the street, and there was no evidence of contributory negligence; that the evidence of the nurse, not being given as expert evidence, was admissible; but if not, the case having been tried without a jury, the Court on appeal could deal with the whole evidence just as the trial Judge could, and there was sufficient to warrant the verdict for the plaintiff if the testimony of the nurse was rejected; and that the whole of the damages assessed were fully warranted.

C. A. Stockton, for the appellant.

Armstrong, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.]

[29TH OCTOBER, 1895.]

BOULTBEE v. COCHRAN.

Parties—Third party procedure—Relief over—Amendment—Time—Rules 328-332—Order—Discretion—Appeal.

An action was brought against two defendants for a money demand. One defendant suffered judgment by default. The plaintiff proceeded against the second defendant, claiming by virtue of an assignment from the first of his claim or action against the second, and at the trial the action was dismissed against the second on the ground that the assignment was inoperative. Upon an appeal by the plaintiff to a Divisional Court, an order was made directing that, notwithstanding the assignment, the first defendant should be allowed to amend the pleadings by claiming over against the second defendant, who was to be allowed also to amend, and further evidence was to be taken, if necessary.

Held, not a mere discretionary order, but one from which an appeal lay.

Hately v. Merchants' Despatch Transportation Co., 12 A. R. 640, followed.

2. That the order could not be sustained under Rules 328-332 (1818) or otherwise, as it was made at too late a stage, and upon the application of the plaintiff only.

Moss, Q.C., for the appellant.

H. J. Scott, Q.C., for the respondent.

HAIST v. GRAND TRUNK RAILWAY COMPANY. OF CANADA.

Negligence—Accord and satisfaction—Receipt—Trial.

Payment to a person injured by an accident on a railway of the sum of ten dollars and a receipt signed by him of "the sum of ten dollars, such sum being in lieu of all claims I might have against said company on account of an injury received on the 6th day of May, 1898," may constitute accord and satisfaction.

An issue as to the effect of the payment and receipt and its procurement by fraud may be tried by the Judge presiding at the trial of an action to recover damages for the alleged injury, and need not necessarily be left to the jury.

Judgment of the Queen's Bench Division, 26 O. R. 19, 15 Occ. N. 86, reversed.

McCarthy, Q.C., for the appellants.

Aylesworth, Q.C., for the respondent.

CH. D.]

McNAB v. TOWNSHIP OF DYSART.

Municipal corporations—By-law—Road allowance—R. S. O. c. 184, ss. 551, 552.

Where a mill erected partly on an unused road allowance, with the permission of the township council, was afterwards pulled down by their orders, on the ground that the terms upon which its erection had been consented to had not been complied with, no by-law for its renewal being passed, the owner was held entitled to damages. The pulling down of the building, if, under the circumstances, justifiable at all, would be so only if authorized by by-law.

Judgment of the Chancery Division affirmed.

Watson, Q.C., for the appellants.

W. Steers, for the respondent.

C. P. D.]

HAUBNER v. MARTIN.

Contract—Sale of goods—Statute of Frauds—Memorandum in writing—Denial of agent's authority.

A letter referring to the terms of the contract, but denying the authority of an alleged agent to make it, is a sufficient memorandum within the Statute of Frauds.

Judgment of the Common Pleas Division affirmed, **BURTON, J.A.**, dissenting.

Robinson, Q.C., and *D. Macdonald*, for the appellant.

W. Cassels, Q.C., and *W. H. Blake*, for the respondents.

ARMOUR, C.J.]

CANADA BANK NOTE COMPANY v. TORONTO RAILWAY COMPANY.

Contract—Sale of goods—Work, labour, and materials—Statute of Frauds.

A contract to print debentures in a special form on paper supplied by the printers is a contract for the sale of goods and chattels, and not a contract for work, labour, and materials, and is within the Statute of Frauds.

Judgment of ARMOUR, C.J., affirmed.

McCarthy, Q.C., and *W. M. Douglas*, for the appellants.

Laidlaw, C.C., and *J. Bicknell*, for the respondents.

C. C. YORK.]

[25TH SEPTEMBER, 1895.]

DOULL v. KOPMAN.

Assignments and preferences—Exclusive right of action—R. S. O. c. 124, s. 7 (2)—Release.

A creditor may, after an assignment for the benefit of creditors, and after the execution by him and the other creditors of the assignor of a release of their debts, in consideration of the

payment of a composition, bring an action in the assignee's name to recover goods fraudulently concealed by the assignor at the time of the assignment.

Such an action may be brought, with the assignee's consent, in his name, without any order under s.-s. 2 of s. 7 of the Assignments Act, but without such an order the recovery will be for the benefit of the estate.

Judgment of the County Court of York reversed.

F. J. Roche, for the appellants.

J. Shilton and *J. B. McLeod*, for the respondents.

[29TH OCTOBER, 1895.]

WEESE v. BANFIELD.

Bankruptcy and insolvency—Composition agreement—Resolution of creditors—Fraud.

A resolution, passed and signed by creditors at a meeting called to consider the debtor's position, that the debtor "be allowed a settlement at 6, 9, and 12 months at the rate of 25 cents on the dollar, in equal payments, without interest," does not in itself operate as satisfaction of their claims. Payment in accordance with its terms is essential.

A creditor who assents to and signs the resolution, but before doing so makes a secret bargain with the debtor for payment of his claim in full, can, notwithstanding the fraudulent bargain, sue the debtor for the original indebtedness upon default in punctual payment according to the terms of the resolution; HAGARTY, C.J.O., dissenting on this point.

Per HAGARTY, C.J.O.—The general doctrine as to "fraud on compositions" applies to a case of this kind, although there is no formal release under seal.

Judgment of the County Court of York reversed, HAGARTY, C.J.O., dissenting.

F. J. Roche, for the appellants.

G. G. Mills, for the respondents.

**CANADA PERMANENT LOAN AND SAVINGS
COMPANY v. TODD.**

Bills of sale and chattel mortgages—Affidavit of bona fides—Designation of commissioner—Solicitor's power to take affidavit—Growing crops—Currency of mortgage.

An affidavit of bona fides in a chattel mortgage sworn before a person who is in fact a "commissioner authorized to take affidavits in and for the High Court," but who places after his signature in the jurat only the words "a commissioner, etc.," is good.

Such an affidavit may be made before a solicitor employed in the office of the mortgagees' solicitors.

Crops to be grown may be covered by a chattel mortgage, and a chattel mortgage of "crops which may be sown during the currency of this mortgage" covers crops sown after the mortgage falls due but remains unpaid; OSLER, J. A., dissenting on this point.

Judgment of the County Court of York affirmed.

J. W. McCullough, for the appellant.

G. A. Mackenzie, for the respondents.

MANITOBA.

In the Queen's Bench.

[BAIN, J., 17TH OCTOBER, 1895.]

LINES v. WINNIPEG ELECTRIC STREET RAILWAY CO.

Street railways—Action for injuries—Negligence—Rate of speed—Proximate cause—Damages.

County Court appeal. This was an action for damages for injuries caused to the plaintiff Emily Lines through the alleged negligence of the defendants. The action was tried by a jury, who found a verdict for the plaintiffs for \$200. The defendants

appealed on the ground that there was no evidence of any negligence on their part that would render them liable for the injury complained of.

It appeared that as a team of horses in a waggon was crossing a bridge, the horses took fright at a street car which, going in the opposite direction, met and passed them just at, or a few feet south of, the south end of the bridge. The driver lost control of the horses and they dashed against the plaintiffs' horses, which were standing, with a sleigh attached, as close to the sidewalk as they could be got, about 80 feet from the bridge; the plaintiff Emily Lines was sitting in the sleigh at the time, and was thrown out and injured. The plaintiffs contended that the car was running at an unreasonable rate of speed, and that it was not at once stopped when the horses began to show fright.

Held, that the appeal must be dismissed with costs. If there was evidence that it was through the negligence of the defendants that the team of horses became frightened and unmanageable, such negligence could properly be said to have been the "immediate cause" of the injury to the plaintiff, and the defendants would be liable. The injury complained of would seem to be a "natural and probable" consequence of the negligence alleged. As regards the rate of speed, at all events where limitations have not been imposed by competent authority, the rate of speed must be reasonable; and what would or would not be a reasonable rate of speed is a question of fact and must depend on the circumstances of each case.

Ewing v. Toronto Railway Co., 24 O. R. 694; *Gosnell v. Toronto Railway Co.*, 21 A. R. 558, followed.

There was evidence of such negligence as might have led to the accident that made it the duty of the Judge to leave the case to the jury; they found, rightly or wrongly, that the accident did result from the defendants' negligence; and there was no authority to review this judgment of fact. The amount awarded, \$200, was not unreasonable.

H. M. Howell, Q.C., for the plaintiffs.

J. H. Munson, Q.C., for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.**NORTHERN ALBERTA JUDICIAL DISTRICT.**

[ROULEAU, J., 30TH SEPTEMBER, 1895.]

In re IBBOTSON.*Land Titles Act, 1894—Registered transfer—Uncancelled certificate—Mortgages by transferor and transferee—Priorities.*

On 19th August, 1891, W. G. Ibbotson was in possession of a certificate of ownership of river lot 6, plan F. On 14th March, 1892, he transferred the lot to Mattie E. Ibbotson, who registered the transfer on the 12th August, 1892, and a certificate of ownership was issued to her, but not until the 16th June, 1895. On the 6th September, 1892, she executed a mortgage to the Canadian Mutual Loan and Investment Company, which was registered on the same day. On 11th December, 1893, W. G. Ibbotson executed a mortgage on the same property to W. H. Kinnisten, who registered it on 13th December, 1893, although he had notice of the registration of the transfer to Mattie E. Ibbotson.

Held, that as soon as the transfer to Mattie E. Ibbotson was registered, the land and all interests therein passed to her. After that, the ministerial duty of the registrar was to cancel the first certificate, and give a new one to the transferee; because he neglected to do so, it did not follow that the registration of the transfer was invalid.

Order made directing that after payment of the costs of the sale of the property, the money realized should be paid to the company.

E. Cave and *E. C. Smith*, for the company.

P. McCarthy, Q.C., and *J. A. Bangs*, for Kinnisten.

[SCOTT, J., 11TH SEPTEMBER, 1895.]

MORRIS v. REGISTRAR OF SOUTHERN ALBERTA
LAND REGISTRATION DISTRICT.

Registry laws—Territories Real Property Act—Certificate of title—Omission of registrar to specify incumbrance—Claim against assurance fund—Subrogation to rights of incumbrancer paid off—Laches—Res judicata—Foreclosure.

The action was originally brought against the registrar alone, as nominal defendant, to recover damages against the assurance fund for loss occasioned by an error or omission of the registrar.

On 26th September, 1889, Gay, being the registered owner of land in the town of Lethbridge, subject to a mortgage to Primrose for \$800, applied to the plaintiff for a loan of \$500 on the security of the land. The plaintiff agreed to advance the amount, and a mortgage was executed by Gay and forwarded to the agent at Calgary of the plaintiff's advocates. On 14th October, 1889, the agent made a search in the registry office at Calgary, and, having ascertained that the Primrose mortgage was the only incumbrance, registered the plaintiff's mortgage and a discharge of the Primrose mortgage, which had been obtained in advance upon an undertaking. At the same time the agent handed Gay's certificate of title to the registrar, who thereupon registered the plaintiff's mortgage and the discharge of the Primrose mortgage, and indorsed memorials thereof on the certificate. Upon receipt of the certificate, the plaintiff's advocates paid the Primrose mortgage and advanced the balance of the \$500 to Gay.

On the 7th October, 1889, one Bentley had filed with the registrar a mortgage made by Gay to him on the same and other property to secure \$2,000 and interest. This mortgage was entered by the registrar in his day-book, but no memorial or memorandum thereof was entered or made in the register or upon Gay's certificate of title until March, 1890, when, the certificate of title having been produced to him by or on behalf of Bentley, the registrar indorsed thereon, and upon the duplicate in the registry, a memorial of such mortgage, under the memorial thereon of plaintiff's mortgage.

Upon a summary application made by Bentley in October, 1891, MAGUIRE, J., held that Bentley's mortgage was registered at the time it was filed, and therefore had priority over the plaintiff's mortgage, and ordered that the registrar should amend the memorials upon the certificate by stating the time of registration of the documents, which amendment was thereupon made. The judgment of MAGUIRE, J., is reported in 12 Oco. N., p. 119, *sub nom.*, *In re Bently and Morris*.

Default having been made by Gay in payment of his mortgage to Bentley, the latter, on 15th September, 1892, obtained an order for foreclosure, under s. 81 of the Territories Real Property Act, which order was duly registered, and a certificate of title issued to Bentley.

In this action the registrar pleaded, *inter alia*, that in respect to the \$807 paid to discharge the Primrose mortgage he was not liable, as the plaintiff had been entitled to be subrogated as against Bentley, and was still entitled to a first lien on the lands; or, if not now so entitled, that it was owing to the plaintiff's laches that he had lost his right.

The plaintiff then procured an order adding Bentley as a defendant, claiming, in the alternative, subrogation as against him, and procured an interim injunction restraining him from disposing of the lands; but the plaintiff did not strike out his claim for the \$807 against the registrar.

The action was tried before Scott, J., who found that the plaintiff advanced the mortgage moneys to Gay relying upon the fact that the certificate of title disclosed no other incumbrance; that the registrar omitted to enter the memorial of the Bentley mortgage on the register at the time of filing under the belief

that the filing without production of the certificate of title was not a registration ; that at no time subsequent to the registration of the Bentley mortgage was the property comprised therein of sufficient value to realize the amount secured thereby ; and that at the time the plaintiff first learned that the Bentley mortgage had been filed, and up to and after the commencement of this action, Gay was in insolvent circumstances, so that the plaintiff could not have recovered from him the amount advanced to him.

Held, that the plaintiff was entitled, as between Bentley and himself, to stand in the position of Primrose in respect of the security held by him, more especially as the mistake of the plaintiff was not caused by any neglect or omission on his part.

Brown v. McLean, 18 O. R., 538, and *Abell v. Morrison*, 19 O. R. 699, followed.

2. That the question was not *res judicata* by the judgment of MAQUIRE, J. ; for that was merely a direction for the guidance of the registrar, and the learned Judge on that application could not enter into nor dispose of any question affecting the equitable rights of the parties.

8. Nor was the question *res judicata* by the foreclosure order ; for that order could not affect the rights of persons claiming under prior incumbrances, and the plaintiff's claim was to be established as a prior incumbrancer. His right to be so established could not be looked upon as a right or equity of redemption which could be barred by the foreclosure order.

4. That no depreciation in the value of the property having been shown, the position of the parties not having been materially altered since the right accrued, and the delay not having been excessive, the laches of the plaintiff was not such as to debar him from enforcing his right to be subrogated.

McLeod v. Wadland, 25 O. R. 118, distinguished.

5. That in order to recover against the assurance fund under s. 108 of the Territories Real Property Act, it was not necessary for the plaintiff to show that he was deprived of land, or of any estate or interest therein, by the mistake or omission.

6. By the terms of s. 108, the remedy under it is applicable only to cases where "the remedy by action for recovery of

damages as hereinbefore provided is barred ;" but the words "as hereinbefore provided" do not refer only to actions barred by ss. 104 and 105, but equally to any of the other provisions preceding s. 108; but for the provisions of s. 82 the plaintiff would have had a right of action against the registrar for the loss sustained, and in such an action it would not have been necessary for the plaintiff to show that he had exhausted his personal remedy against the mortgagor; in order to entitle the plaintiff to recover, it was not necessary that all his remedies, whether direct or indirect, should have been barred; it was sufficient for him to show that his principal remedy, that against the registrar, had been barred.

7. That there was a sufficient tender of the Bentley mortgage for registration on the 7th October, 1889, and the reason for refusing it, as already decided by *MAGUIRE, J.*, was untenable.

8. That the plaintiff was justified in relying upon the certificate of title and the memorials indorsed thereon, which showed his mortgage and no other incumbrances affecting the lands, and the indorsement by the registrar of the memorial of the plaintiff's mortgage was equivalent to a certificate that there were no prior incumbrances affecting the lands other than those appearing upon the certificate of title.

9. Even if there had been a valid agreement on the part of Bentley to take over the plaintiff's mortgage, the plaintiff's failure to enforce it would not have precluded him from claiming against the assurance fund.

Judgment declaring the plaintiff entitled as against the defendant Bentley to stand in the position occupied by Primrose under his mortgage at the time of the payment and discharge thereof by the plaintiff, and to a first lien or mortgage for the amount thereof and interest thereon upon the lands in question.

Judgment for the plaintiff against the registrar (as representing the assurance fund) for \$193, with interest from 1st January, 1890.

C. F. P. Conybeare, Q.C., and *G. S. McCarter*, for the plaintiff.

James Muir, Q.C., and *C. C. McCaul, Q.C.*, for the registrar.

P. McCarthy, Q.C., and *Horace Harrey*, for the defendant Bentley.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[ROULEAU, J., 21ST OCTOBER, 1895.]

O'NEILL v. FARR.

Parties—Interpleader issue—Who should be plaintiff—Husband and wife.

Upon a sheriff's interpleader application with respect to certain sheep seized under execution and claimed by the wife of the execution debtor as her separate property, it appeared that the husband and wife lived together upon Government land, which they occupied as squatters and upon which the sheep were seized.

C. C. McCaul, Q.C., for the sheriff and execution creditor, contended that the claimant should be plaintiff in the issue directed upon the application.

P. McCarthy, Q.C., for the claimant, contended that the execution creditor should be plaintiff.

ROULEAU, J.—I think that the rule in settling the form of an interpleader issue is properly laid down in *Doran v. Toronto Suspender Co.*, 14 P. R. 103. Street, J., says: "The proper rule to be followed in settling the form of an interpleader issue is to put into the position of plaintiff the party upon whom the substantial *onus* of proof should properly rest."

In this case it is of evidence that the defendant J. J. Farr lives with his wife, Agnes J. Farr. *Prima facie* there is no doubt that the sheep seized were in the possession of the husband. I am not called upon at this stage of the proceedings to declare who is the owner of the sheep. The wife claims the same as her separate property; the burden of the proof is necessarily on her. How can an execution creditor prove the negative? I can hardly conceive it. It would have been quite different if the sheriff had seized the sheep in the possession of the third party—not a married woman. Then the rule followed in *Duncan v. Tees*, 11 P. R. 66 and 276, would have applied, for the very con-

clusive reason given in that case, that the sheriff has no right to seize things in the possession of B. when he has an execution against A. unless he be prepared to prove that B.'s possession is in reality A.'s possession; *e.g.*, that B. is only a trustee for A.

The cases of *Ripstein v. Canadian Loan and Investment Co.*, 7 Man. L. R. 119, and *Ady v. Harris*, 9 Man. L. R. 127, are very similar to this case. In the first case it was decided that the *onus* of proof was on the wife, and that the evidence must be clear and satisfactory as to how she became possessed of her separate estate, and that her own uncorroborated evidence was not sufficient.

In the second case it was also decided that the *onus* of proof was on the wife to show that the farming business was carried on by her, notwithstanding her ownership of the land.

Being of the opinion in the present case that the *onus* is upon the claimant, the wife of the defendant, to prove in a clear and satisfactory manner how she became possessed of that separate estate, and to have that evidence corroborated, I therefore order that the claimant, Agnes J. Farr, be made the plaintiff, and the execution creditor John O'Neill the defendant, in this interpleader issue.

Judicial Committee of Privy Council.

[16TH NOVEMBER, 1895.]

In re VIRGO AND CITY OF TORONTO.

Municipal corporation—By-law—Hawkers—Power to “license, regulate, and govern” trade—Prohibition of trade—Public rights.

By a by-law of the council of the city of Toronto, hawkers, petty chapmen, and other small traders were prohibited from pursuing their respective callings on certain streets comprising the principal business part of the city.

By s. 495, s.-s. 3, of the Consolidated Municipal Act, 55 V. c. 42, it is enacted that the council of any city may pass by-laws “for licensing, regulating, and governing hawkers or petty chapmen, and other persons carrying on petty trades . . . and for fixing the sum to be paid for a license for exercising such calling . . . and the time the license shall be in force.”

Held, that there was a marked distinction to be drawn between prohibition or prevention of a trade, and the regulation or governance of it. The question was one of substance, and should be regarded from the point of view of the public, as well as of that of the hawkers. The effect of the by-law was practically to deprive residents of buying goods or trading with the class of traders in question. It was not the intention of the Act to give to the council the prohibitory powers which by the by-law they attempted to exercise.

Judgment of the Supreme Court of Canada, 22 S. C. R. 447, 14 Occ. N. 241, affirmed.

E. Blake, Q.C., for the appellants.

DuVernet (of the Ontario bar) and *Horace Ivory*, for the respondent.

Supreme Court of Canada.

EXCHEQUER COURT.]

[26TH JUNE, 1895.]

TORONTO RAILWAY CO. v. REGINAM.

Revenue—Customs duties—Exemption—Steel rails—Street railway—Customs Tariff Act, 50 & 51 V. c. 39, item 173.

By item 173 of the Customs Tariff Act, 50 & 51 V. c. 39, steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks, are exempt from duty.

Held, affirming the decision of the Exchequer Court, 4 Ex. C. R. 262, STRONG, C.J., and KING, J., dissenting, that this exemption does not apply to rails for use on street railway tracks.

Robinson, Q.C., and Osler, Q.C., for the appellants.

Newcombe, Q.C., and F. E. Hodgins, for the Crown.

ONTARIO.]

[6TH MAY, 1895.]

IRWIN v. VICTORIA HARBOUR LUMBER CO.

Contract—Sale of timber—Delivery—Time for payment—Premature action.

By agreement in writing the plaintiff agreed to sell and the defendants to purchase timber, to be delivered "free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour so that the timber may be counted. . . . Settlement to be finally made inside of thirty days, in cash, less two per cent. for the dimension timber which is at John's Island."

Held, affirming the decision of the Court of Appeal, that the last clause did not give the purchasers thirty days after delivery for payment; that it provided for delivery by the vendor and payment by the purchasers within thirty days from the date of the contract; and that if the purchasers accepted the timber

after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance.

Laidlaw, Q.C., and *J. Bicknell*, for the appellants.

McCarthy, Q.C., and *F. B. Edwards*, for the respondent.

[24TH JUNE, 1895.]

ROBERTSON v. GRAND TRUNK R. W. CO.

Railways—Carriers—Limitation of liability—Conditions—Negligence—Shipping contract—Horse—51 V. c. 29, s. 246 (3)—Damages.

By s. 246 (3) of the Railway Act, 51 V. c. 29 (D.), "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants."

Held, affirming the decision of the Court of Appeal, 21 A. R. 204, 14 Occ. N. 248, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to the amount of damages to be recovered for loss or injury to such goods arising from negligence.

Vogel v. Grand Trunk R. W. Co., 11 S. C. R. 612, and *Bate v. Canadian Pacific R. W. Co.*, 15 A. R. 388, distinguished.

The defendants received from the plaintiff a horse to be carried over their line, and the agent of the defendants and the plaintiff signed a contract for such carriage, which contained this provision: "The company shall in no case be responsible for any amount exceeding \$100 for each and any horse," etc.

Held, affirming the decision of the Court of Appeal, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss, howsoever caused, and the horse having been killed through the negligence of servants of the defendants, the plaintiff could not recover more than \$100, though the value of the horse largely exceeded that amount.

Moss, Q.C., and *H. H. Collier*, for the appellant.

Osler, Q.C., and *W. Nesbitt*, for the respondents.

VALAD v. TOWNSHIP OF COLCHESTER SOUTH.

Practice—Reference—Report of referee—Time for moving against—Notice of appeal—Rules 848, 849—Extension of time—Confirmation of report by lapse of time.

In an action against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to s. 101 of the Judicature Act and Rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed and that the plaintiff was entitled to \$600 damages. The defendants appealed from the report, and the Court held ~~that~~ the appeal was too late, no notice having been given within the time required by Rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by the plaintiff to the Court, on which it was contended on behalf of the defendants that the whole case should be gone into upon the evidence, which the Court refused to do.

Held, affirming the decision of the Court of Appeal, that the appeal not having been brought within one month from the date of the report, as required by Rule 848, it was too late; that the report had to be filed before the appeal could be brought, but the time could not be enlarged by delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which this Court would not interfere.

Held, also, Gwynne, J., dissenting, that the report having been confirmed by lapse of time and not appealed against, the Court on the motion for judgment was not at liberty to go into the whole case upon the evidence, but was bound to adopt the referee's findings and to give the judgment which those findings called for.

Freeborn v. Vandusen, 15 P. R. 267, approved and followed.

M. Wilson, Q.C., for the appellants.

Douglas, Q.C., and *Langton*, Q.C., for the respondent.

 McKINNON v. LUNDY.

Will—Devise—Death of testator caused by devisee—Manslaughter.

In an action for a declaration as to title to land, the defendant claimed under a deed from his brother, who derived title under

the will of his wife, for causing whose death he had been convicted of manslaughter and sentenced to imprisonment.

Held, reversing the decision of the Court of Appeal, 21 A. R. 560, 14 Occ. N. 419, TASCHEREAU, J., dissenting, and restoring the judgment of FERGUSON, J., 24 O. R. 182, that the devisee, having caused the death of the testator by his own criminal and felonious act, could not take under the will, and that in such case no distinction could be made between a death caused by murder and one caused by manslaughter.

S. H. Blake, Q.C., for the appellants.

Aylesworth, Q.C., and *J. L. Morphy*, for the respondent.

WRIGHT v. BELL.

Solicitor—Lien for costs—Administration—Fund in Court—Share of party—Costs of other parties—Priorities—Reference—Jurisdiction of referee.

In a suit for construction of a will and administration of the testator's estate, where the land of the estate had been sold and the proceeds paid into Court, J., a beneficiary under the will and entitled to a share in said fund, was ordered personally to pay certain costs to other beneficiaries.

Held, reversing the decision of the Court of Appeal, 16 P. R. 335, 14 Occ. N. 498, that the solicitor of J. had a lien on the fund in Court for his costs as between solicitor and client, in priority to the parties who had been allowed costs against J. personally.

Held, also, that the referee before whom the administration proceedings were pending, had no authority to make an order depriving the solicitor of his lien, not having been so directed by the administration order, and there being no general order permitting such an interference with the solicitor's *prima facie* right to the fund.

E. D. Armour, Q.C., and *McBrayne*, for the appellants.

A. H. F. Lefroy and *H. T. Beck*, for the respondents.

QUEBEC.]

[6TH MAY, 1895.]

MURPHY v. BURY.

Signification of transfer—Condition precedent to right of action—Partnership transaction in real estate—Act of resiliation—Effect of.

The signification of a transfer or sale of a debt or right of action is a condition precedent absolutely required to vest in the transferee or purchaser the full right of action against the debtor, and the necessity of such signification is not removed by proof of knowledge by the debtor of the transfer or sale.

The want of such signification is put in issue by a *défense au fonds en fait*.

M. and B. entered into a speculation together in the purchase of a property known as the H. property. The title to the property was taken in the name of B., and the first instalment of the purchase money was acquired from one P. A. M., a brother of M., to whom B. gave an obligation therefor. B. then transferred to M. a half interest in the property. As the remaining instalments of purchase money fell due, suits were brought by the vendor against B. As fast as these demands assumed the form of judgments, M. advanced the requisite amount and took a transfer of them, as he did also of P. A. M.'s obligation against B., but without any signification in either case. Subsequently, by a formal act of resiliation, B. and M. annulled the transfer of the half interest in the property made by B. to M., and formally relieved M. of all further obligation as proprietor *par indivis* for further advances towards the balance due the vendor, and threw the burden of providing it entirely upon B.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada, appeal side, that the act of resiliation and the replacement of the title which it effected into the name of B. was a virtual abandonment on the part of M. of all previous investments made by him in the property or in the claims of others against that property of which he might have taken transfers.

Beique, Q.C., and *Monk*, Q.C., for the appellant.

Barnard, Q.C., for the respondent.

[24TH JUNE, 1895.]

LIGGETT v. HAMILTON.

*Partnership—Dissolution—Winding-up—Extra services of one partner—
Contract to pay for.*

L. and H. were partners in a business consisting of two branches, a dry goods branch under the care of H., and a branch for selling carpets which L. managed. The partnership having been dissolved, each partner remained in charge of his own branch in order to wind it up, and in the final distribution L. charged against the firm a sum for commissions on collections and charges of management in his branch.

Held, affirming the decision of the Court of Queen's Bench, that there was no express agreement that L. was to be paid for extra services, and none could be inferred from the circumstances; that L., when he undertook to wind up the carpet branch, must be understood to have undertaken to do it gratuitously; and that he was not entitled to remuneration because the work proved more laborious than he anticipated.

Davidson, Q.C., for the appellant.

Geoffrion, Q.C., for the respondent.

O'DELL v. GREGORY.

Appeal—Jurisdiction—Future rights—R. S. C. c. 135, s. 29 (b)—56 V. c. 29.

By R. S. C. c. 135, s. 29 (b), as amended by 56 V. c. 29, an appeal will lie to the Supreme Court of Canada from judgments of the Courts of highest resort in the Province of Quebec in cases where the amount in controversy is less than \$2,000, if the matter relates to any title to lands or tenements, annual rents, and other matters or things where the rights in future might be bound.

Held, upon motion to quash the appeal, that the words "other matters or things" mean rights of property analogous to title to lands, etc., which are specifically mentioned, and not personal rights; that "title" means a vested right or title already acquired, though the enjoyment may be postponed; and that the

right of a married woman to an annuity provided by her marriage contract in case she should become a widow is not a right in future which would authorize an appeal in an action by her husband against her for *separation de corps*, in which, if judgment went against her, the right to the annuity would be forfeited.

The appeal quashed with costs.

Fitzpatrick, Q.C., for the motion.

McCarthy, Q.C., and *Lemieux*, Q.C., contra.

[26TH JUNE, 1895.]

BELANGER v. BELANGER.

Contract—Proprietor of newspaper—Engagement of editor—Dismissal—Breach of contract.

A. B. and C. B., who had published a newspaper as partners or joint owners, entered into a new agreement by which A. B. assumed payment of all the debts of the business and became from that time sole proprietor of the paper, binding himself to continue its publication, and, in case he wished to sell out, to give C. B. the preference. The agreement also provided that:

8. "Le dit Louis Charles Bélanger devient, à partir ce jour, directeur et rédacteur du dit journal, son nom devant paraître comme directeur en tête du dit journal, et pour ses services et son influence comme tel, le dit Louis Arthur Bélanger lui alloue quatre cents piastres par année, tant par impressions, annonces, etc., qu'en argent jusqu'au montant de cette somme, et le dit Louis Arthur Bélanger ne pourra mettre fin à cet engagement sans le consentement du dit Louis Charles Bélanger."

The paper was published for some time under this agreement as a supporter of the Liberal party, when C. B., without instructions from or permission of A. B., wrote editorials violently opposing the candidate of that party at an election, and was dismissed from his position on the paper. He then brought an action against A. B. to have it declared that he was "rédacteur et directeur" of the newspaper, and claiming damages.

Held, reversing the decision of the Court of Queen's Bench, that C. B. was rightly dismissed; that by the agreement he

became the employé of A. B., the owner of the paper; and that he had no right to change the political colour of the paper without the owner's consent.

White, Q.C., for the appellant.

Brown, Q.C., for the respondent.

ARCHIBALD v. DELISLE.

BAKER v. DELISLE.

MOAT v. DELISLE.

Costs—Appeal for—Action in warranty—Proceedings taken by warrantee before judgment in principal demand—Joint speculation—Partnership or ownership par indivis.

Though an appeal will not lie in respect of costs only, yet where there has been a mistake upon some matter of law, or of principle, which the party appealing has an actual interest in having reviewed, and which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal.

It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment in the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in, where no question of jurisdiction arises and he suffers no prejudice thereby.

But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned, he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences.

W. and D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other; and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his undivided

interest. Upon the death of W. and D. the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of and to protect some of the legatees of W., without any change being made in the manner of conducting the business. A bookkeeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheques drawn in a similar way. M. N. D., who looked after the business for the representatives of D., paid diligent attention to the interests confided to him, and received their share of such profits; but J. C. B., who acted in the W. interest, so negligently looked after the business as to enable the bookkeeper to embezzle moneys which represented part of the share of the profits coming to the representatives of W.

In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses:—

Held, affirming the judgment of the Superior Court and of the Superior Court sitting in review, that the facts did not establish a partnership between the parties, but a mere ownership *par indivis*, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them.

Even if a partnership existed, there would be none in the moneys paid over to the parties after a division made.

Geoffrion, Q.C., and *Abbott*, Q.C., for the appellants.

Beique, Q.C., and *Lafleur*, for the respondents.

NORTH-WEST TERRITORIES.]

[26TH JUNE, 1895.]

DONOHUE v. HULL.

Husband and wife—Purchase of land by wife—Re-sale—Purchase money—Garnishment—Debt of husband—Practice—Statute of Elizabeth—Hindering or delaying creditors.

D., having entered into an agreement to purchase land, had the conveyance made to his wife, who paid the purchase money.

and obtained a certificate of ownership from the registrar of deeds, D. having transferred to her all his interest by deed. She sold the land to M., and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not, in fact, paid. M.'s solicitors were also solicitors of certain judgment creditors of D., and judgment having been obtained on their debts, the purchase money of the transfer was garnished in the hands of M., and an issue was directed between the judgment creditors and the wife of D. to determine the title to the money under the garnishing order, and the money was, by consent, paid into Court. The judgment creditors claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the statute of Elizabeth, and that she therefore held the land, and was entitled to the purchase money on the re-sale, as trustee for D.

Held, reversing the decision of the Supreme Court of the North-West Territories, that the garnishee proceedings were not properly taken; that the purchase money was to have been paid by M. on delivery of the deed of transfer, and the vendor never undertook to treat him as a debtor; that if there was a debt, it was not one on which D., the judgment debtor, as against whom the garnishment proceedings were taken, could maintain action in his own right, and for his own exclusive benefit; and that D.'s wife was not precluded, by having assented to the issue and to the money being paid into Court, from claiming that it could not be attached in these proceedings.

Held, also, that under the evidence given in the case, the original transfer to the wife of D. was *bona fide*; that she paid for the land with her own money and bought it for her own use; and that if it was not *bona fide*, the Supreme Court of the Territories, though exercising the functions and possessing the powers formerly exercised and possessed by Courts of equity, could not, in these statutory proceedings, grant the relief that could have been obtained in a suit in equity.

E. D. Armour, Q.C., for the appellant.

Gibbons, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

CH. D.]

[28TH NOVEMBER, 1895.

KELLY v. BARTON.

KELLY v. ARCHIBALD.

Arrest—Notice of action—Police officers—Malice—R. S. O. c. 73—Trespass.

An appeal by the defendants Barton and Archibald from the decision of the Chancery Divisional Court, 26 O. R. 608, *ante* p. 290, that the appellants, police officers who arrested the plaintiff, were trespassers and not entitled to notice of action alleging malice, and from the order of the Court directing a new trial as against the appellants, was dismissed with costs, this Court agreeing with the decision below.

W. R. Riddell, for the appellants.

McCarthy, Q.C., and *Biggar*, Q.C. for the plaintiffs.

C. C. MIDDLESEX.]

[29TH OCTOBER, 1895.

EMPIRE OIL CO. v. VALLERAND.

Writ of summons—Service out of jurisdiction—Rule 271 (e)—Breach of contract—Place of performance—Correspondence.

In an action for damages for non-delivery of goods, it appeared that the contract of sale was made by correspondence between the plaintiffs at London, Ontario, and the defendant at Quebec, and the goods were to be shipped by the defendant from Quebec to London. In answer to a suggestion made in a letter of the

defendant, relating to a prior contract, the plaintiffs wrote that they could "take 500 more barrels," to which the defendant replied that he "would ship" them, but some time afterwards wrote again refusing to do so.

Held, that the contract was made in Quebec, and, in the absence of any express agreement to the contrary, was to be performed there by delivery of the goods to carriers to be carried to London; and the cause of action was, therefore, not one in respect of which service of the writ of summons out of the jurisdiction could properly be allowed under Rule 271 (e), (1809.)

Judgment of the County Court of Middlesex reversed.

Talbot Macbeth, for the appellant.

Gibbons, Q.C., for the repondents.

3RD D. C. ESSEX.]

[OSLER, J.A., 19TH OCTOBER, 1895.]

SCRATCH v. KINGSVILLE PRESERVING CO.

Assignments and preferences—Insolvent company—Sale of chattels to director—Bona fides—Right of execution creditor to impeach—Surety—R. S. O. c. 124, s. 3 (1)—55 V. c. 25, s. 1.

An appeal by the claimant in an interpleader issue from the judgment of the 3rd Division Court in the county of Essex in favour of the execution creditors. The evidence established a sale by the directors of the company, the execution debtors, of the articles in question, with others, at the same time as the land was sold at auction by the second mortgagee—a sale ratified before the seizure under the execution. The claimant purchased the land, subject to the first mortgage, as well as the chattels, and took immediate possession of the whole. The chattels were used in the business carried on by the defendants on the land, and the claimant purchased the whole for the purpose of continuing to carry on the business. There was no question as to the *bona fides* of the whole sale, nor that the best price was obtained for both land and chattels, and more than could have been got had they been sold separately.

Held, that the sale was protected by R. S. O. c. 124, s. 3, s.-s. (1), as a *bona fide* sale for a fair price presently paid, even though the vendors were insolvent within the meaning of the Act.

The Judge in the Court below held that the company, being insolvent at the time of the sale, could not lawfully dispose of its assets, and that the claimant, being a director of the company, purchased with notice of its insolvent condition.

Held, that the sale was not on that ground invalid against an execution creditor.

Nor did the evidence admit of the sale being impeached as a preference of the claimant as one of the sureties for the company to the second mortgagee so as to be within 55 V. c. 25, s. 1.

That the purchaser was one of the directors did not affect the reality of the sale, nor, necessarily, its *bona fides*. Reasons might exist, but were not shown here, which might warrant the company or a shareholder in attacking the sale; but it was a perfectly valid sale against the execution creditor.

Whiting v. Hovey, 18 A. R. 7, 14 S. C. R. 515, and *Beatty v. North-West Transportation Co.*, 11 A. R. 205, 12 App. Cas. 589, specially referred to.

Appeal allowed with the usual costs, and judgment to be entered for claimant with costs of trial and motion for new trial in the Court below.

Rodd, for the claimant.

D. Armour, for the execution creditor.

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1st D. C. MIDDLESEX.]

[11TH NOVEMBER, 1895.]

LINDOP v. WILSON.

Assignments and preferences—Assignment of debt—Assignee not named—Preference—Impeachment—Time—Presumption—Rebuttal—Onus—Knowledge.

An appeal by Rebecca Wilson, claimant, from the judgment of the senior Judge of the County Court of Middlesex, presiding in the 1st Division Court in that county, upon an issue arising out of a garnishing plaint, holding that the judgment creditor was entitled to garnish, to the amount of his judgment against the primary debtor, a debt owing to the latter by the garnishees, and that an assignment of the debt, made on 3rd June, 1895, by the debtor to the claimant, was, to that extent, fraudulent and void as against the judgment creditor, and also that the assign-

ment was insufficient or ineffectual to transfer the debt in question to the claimant, as she was not named therein as the assignee.

The assignment was as follows: "In consideration of a certain indebtedness due Rebecca Wilson, I do hereby assign an account due and accruing due C. Wilson & Son and owing by the L. & P. S. Ry. for the sum of \$785, for valuable consideration."

The action was commenced on 5th July, 1895; the appellant filed her claim under the assignment on 23rd July, 1895; and on 2nd August, 1895, an order was made appointing a day for trial of the claim, pursuant to s. 197 of the Division Courts Act.

Held, that the assignment was effectual, though the assignee was not named.

Green v. Davies, 4 B. & C. 235, followed.

2. That the assignment was voidable under 54 V. c. 20, s. 1 of which substitutes a new s. 2 in R. S. O. c. 124, the assignment having been impeached or brought into question on the 23rd July, or at latest the 2nd August, and therefore within sixty days from the date of the assignment.

3. That the transaction had the effect of giving Rebecca Wilson a preference over the other creditors of her son, the judgment debtor, and the statute raised, under the circumstances, a presumption, the *onus* of displacing which, if rebuttable—see *Cole v. Porteous*, 19 A. R. 111; *Lawson v. McGeoch*, 20 A. R. 464—was cast upon her.

4. That Rebecca Wilson had not succeeded in displacing the presumption, and there was ample evidence to support the finding that the primary debtor was insolvent within the meaning of the Act when he made the assignment, and that his mother, the claimant, must have known it, if that were now an element in avoiding the transaction.

Warnock v. Kloepper, 14 O. R. 288, 15 A. R. 324, specially referred to.

Appeal dismissed with costs.

L. F. Heyd, for the appellant.

McEvoy, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[MEREDITH, C.J., 19TH SEPTEMBER, 1895.]

BURWELL v. LONDON FREE PRESS PRINTING CO.

Libel—Newspaper—Notice of action—Sufficiency.

In an action brought against a newspaper company for alleged libellous articles published in the company's newspaper, the notice complaining of the publications, given in pursuance of R. S. O. c. 59, s. 5, s.-s. 2, was addressed to the editor of the paper, and was served on the city editor at the company's office, and a similar notice was served on the chairman of the board of directors at the same office.

Held, that this was a notice merely to the editor, and not to the defendants, and therefore was not sufficient under the statute.

R. U. Macpherson, for the plaintiff.

Shepley, Q.C., for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 30TH MAY, 1895.]

SYLVESTER v. MURRAY.

Contract—Sale of land—Purchase money—Conditional promise—Effect of—Costs—Set-off.

An appeal by the plaintiff from the judgment of Boyd, C., *ante* p. 276, 26 O. R. 599, was dismissed with costs.

Upon the defendants' cross-appeal from the same judgment as to the set-off of their costs against the plaintiff's claim, the judgment was varied by providing that the set-off should be

allowed, if the plaintiff should ever become entitled to recover the \$500 sued for.

No costs of defendants' appeal.

J. J. Scott and *A. McLean Macdonell*, for the plaintiff.

Watson, Q.C., for the defendants.

[13TH JULY, 1895.]

COBBAN MANUFACTURING CO. v. CANADIAN PACIFIC
R. W. CO.

Railways—Damage to goods—Negligence—Evidence of—Findings of jury—Conjecture—New trial—51 V. c. 29, ss. 226, 227, 246 (D.)—Reduced rate—Release of company from negligence.

Where the findings of the jury as to the grounds of negligence in an action against a railway company for damage to goods were based on mere conjecture, the verdict for the plaintiffs was set aside, but, as it could not be said that there was no evidence of negligence on other grounds, a new trial was directed.

Per MACMAHON, J., dissenting.—A presumption of negligence arose from the non-delivery of the goods, and the plaintiffs were not bound to show any particular acts of negligence.

The plaintiffs' agent shipped a quantity of plate glass by the defendants' railway, signing an agreement that, in consideration of the defendants receiving the goods at a reduced rate of twenty-three cents per 100 pounds, they should not be responsible for any damage arising in the course of the transit, including negligence. The defendants had two rates, namely, the twenty-three cents—a third-class rate—and a double first-class rate of sixty cents, which they contended were in accordance with the Canadian Joint Freight Classification, adopted by them and approved by the Governor in Council under s. 226 of 51 V. c. 29 (D.), the said classification stating that the third-class rate applied where the goods were "shipped at owner's risk, shipper signing special plate glass release form." The plaintiffs' agent was aware of the two rates, and signed the agreement assenting to the lower rate, under the belief that the defendants could not,

under s. 246, take advantage of the provision absolving them from liability where the damage was occasioned by negligence. No by-laws approving of the company's tariff under which these rates were charged had been approved of by the Governor in Council, although a by-law fixing a first-class rate of sixty-six cents and a third-class rate of fifty cents had, *inter alia*, been so approved.

Held, per MEREDITH, C.J., that, notwithstanding the payment of the lower rate, and the agreement signed by their agent, the defendants could not, under s. 246, relieve themselves from liability where negligence was proved.

Per ROSE, J.—The third-class rate was the only rate "lawfully payable," and the provision in the freight classification as to release was *ultra vires*, as contrary to the provisions of s. 246.

Per MACMAHON, J.—No by-law fixing the rate at sixty cents having been approved of by the Governor in Council, there was no freight "lawfully payable," without which there could be no alternative rate, and the release, which would otherwise have been valid, was inoperative.

D. E. Thomson, Q.C., and J. B. Holden, for the plaintiffs.

Wallace Nesbitt and Angus MacMurchy, for the defendants.

[MEREDITH, C.J., 17TH JULY, 1895.]

SMITH v. HARWOOD.

Costs—Solicitor and client—Action—Reference—Taxation—R. S. O. c. 147, s. 32—Costs of unsuccessful application—Costs paid to opposite party—Counsel fees—Quantum—Discretion.

By the judgment in an action it was ordered that the plaintiffs should recover against the defendant whatever amount should be found due to them on the taxation of their solicitors' bills of costs of certain litigation, as between solicitor and client, and certain bills were referred for taxation between solicitor and client.

Upon appeal from the taxation :—

Held, that it was to be treated as if it had been directed on an application, under s. 32 of the Solicitors' Act, R. S. O. c. 147,

by the defendant as the person chargeable, and was a taxation between the solicitors and their clients, the plaintiffs.

2. That the decision of the taxing officer allowing to the solicitors the costs of an unsuccessful interlocutory application, undertaken in the exercise of an honest and fair discretion should not be interfered with.

3. That the payment by the solicitors to the opposite party in the litigation of a sum for interlocutory costs which the plaintiffs were ordered to pay, while not properly such a disbursement as should be included in the bill of the costs of the action, was a proper payment on behalf of the clients, to which payments credited on the reference might have been applied, and should be treated as so applied.

4. That, notwithstanding the provisions of the tariff, the taxing officer was justified in taxing larger counsel fees upon this taxation than had already been allowed between solicitor and client for the same services.

Re Geddes and Wilson, 2 Ch. Chamb. R. 447, followed.

5. That the discretion of the taxing officer as to the amount of counsel fees should not be interfered with.

J. Bicknell, for the defendant.

O'Heir, for the plaintiffs.

[FERGUSON, J., 7TH SEPTEMBER, 1895.]

FISHER v. WEBSTER.

Deed—Construction of—Grant of road—Easement—Right of way.

Where a deed, after granting certain land described by metes and bounds, continued, "also a road forty feet wide," adding to the description thereof "and not included in the above quantity of land :"—

Held, that by the conveyance of the road the fee in the freehold therein did not pass to the grantee, but merely an easement of the right of way over the land.

Osler, Q.C., and *H. C. Gwyn*, for the plaintiff.

Lynch-Staunton and *A. R. Wardell*, for the defendant.

[MACMAHON, J., 16TH OCTOBER, 1895.]

HOPKINS v. TOWN OF OWEN SOUND AND TROTTER.

*Municipal corporation—Approach to highway erected by private person—
Accident—Liability.*

T., with the knowledge of and without any objection by a municipal corporation, erected across a ditch lying between the sidewalk and the crown of the highway, an approach constructed of stringers placed across the ditch, covered with planks, to enable his horses and waggons, etc., to reach his property, which, without any contract or arrangement with the corporation, was from time to time kept in repair by T. Subsequently it was allowed to fall into disrepair, and when the plaintiff was attempting to cross to the other side of the road, on walking over the approach, her foot slipped through a hole in it, and she was injured.

Held, that the defendant T. was liable for the damage thus sustained.

H. G. Tucker, for the plaintiff.

Masson, Q.C., for the defendant Trotter.

H. B. Smith, for the defendants the corporation of the Town of Owen Sound.

[STREET, J., 11TH NOVEMBER, 1895.]

MAY v. DRUMMOND.

*Judgment—Recovery of land—Ancillary claim—Joinder of causes of action—
Motion for judgment.*

The plaintiff, without leave, indorsed his writ of summons with a claim for recovery of land and to set aside a conveyance. The writ was personally served, and, the defendant not appearing, the plaintiff delivered a statement of claim, and, on default of defence, moved the Court for judgment. It appeared from the statement of claim that the setting aside of the conveyance mentioned in the indorsement was sought by the plaintiff as a part of what was necessary to establish his title.

Held, following *Gledhill v. Hunter*, 14 Ch. D. 492, that the action was to be treated as one for the recovery of land merely in which judgment for default of appearance could have been entered without a motion; or, if not, that the plaintiff had improperly joined another claim with a claim for the recovery of land, without leave; and in either case the motion must be refused.

J. A. Donovan, for the plaintiff.

No one appeared for the defendant.

[15TH NOVEMBER, 1895.]

KING v. YORSTON.

Will—Construction—Election—General words—“My estate”—Insurance policies—Apportionment—Variation—R. S. O. c. 136, s. 6 (1)—Deficiency of assets—Legacies—Abatement—Costs.

Testatrix by her will left all her property to her executors upon trust, *inter alia*, (5) to set apart \$4,500 and pay the income to the plaintiff, one of her sons; (6) to realize on all the residue of the estate, and, after providing for maintenance of unsold portions, to pay \$1,400 to a second son and \$2,000 to a third, and, when all the residue should be realized, to divide it equally between these two; (7) after the death of the plaintiff, to divide the \$4,500 among his children, adding—“It is my will that my son Robert” (the plaintiff) “is to get no benefit from my estate except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life.” Two policies of insurance on her life formed part of the estate of the testatrix, and she had besides effected an insurance for \$2,000 on her life, payable to the three sons, which was in force at the time of her death. None but general words were used in describing the property which was to pass.

Held, that the plaintiff was not put to an election between the benefits given to him by the will and his share of the \$2,000 policy, there being no attempted disposition in the will of the \$2,000 policy, general words being insufficient to raise a case of election, and the words above quoted being applicable to the policies forming part of her estate.

Nor could it be held that the testatrix, by the words above quoted, had varied the apportionment of the \$2,000 policy, under the powers conferred by R. S. O. c. 136, s. 6 (1), and amendments, so as to exclude the plaintiff or put him to his election.

Held, further, that in the event of the assets not being sufficient to admit of the setting apart of the \$4,500 and the payment of the two legacies of \$1,400 and \$2,000, the \$4,500 was first to be provided for without abatement, and the other two legacies were to come out of the residue, and abate in the event of a deficiency.

No order was made as to the plaintiff's costs, and those of the defendants were ordered to be paid out of the estate, *i.e.*, the residue.

Snow, for the plaintiff.

W. H. P. Clement, for the defendant W. J. King.

J. M. Clark, for the defendant Alexander King.

G. C. Campbell, for the defendants the executors.

IN CHAMBERS.

[MEREDITH, C.J., 22ND NOVEMBER, 1895.]

PAYNE v. COUGHELL.

Indemnity—Third party procedure—Breach of contract—Rule 328.

Rule 328 (1813) applies only to claims to indemnity as such, either at law or in equity, and does not apply to a right to damages arising from breach of contract, the latter being a right given by law in consequence of the breach of the contract between the parties, while the former is given by the contract itself.

Birmingham and District Land Co. v. London and North-Western R. W. Co., 84 Ch. D. 261, followed.

Page v. Midland R. W. Co., [1894] 1 Ch. 11, distinguished.

And where an action was brought against lessees of a road for a declaration that they had no right to exact tolls, etc., and

the defendants claimed to be indemnified by their lessors upon the ground that the latter had warranted their title to the road by the lease :—

Held, not a case in which leave should be given to issue a third party notice.

C. W. Kerr, for the defendants.

W. H. Blake, for the proposed third parties.

[STREET, J., 11TH NOVEMBER, 1895.]

MAJOR v. MACKENZIE.

Security for costs—Insolvent plaintiff—Want of beneficial interest—Parties—Consent—Amendment—Discretion.

In order to entitle a defendant to security for costs, it is not sufficient to shew that the plaintiff is a man of no means and has no beneficial interest in the subject matter of the action; it must be shewn that it is really the action of some other person.

Gordon v. Armstrong, 16 P. R. 432, explained and followed.

The defendant sought, in the alternative, to have the persons alleged to be really beneficially interested added as plaintiffs.

Held, that they could not be added without their consent in writing : Rule 324 (b).

Leave given to amend the defence by setting up that these persons were necessary parties.

Semble, however, that the Court has a discretion, under Rule 319, to proceed in the absence of some of the persons interested in the question under adjudication.

J. J. Warren, for the plaintiff.

J. T. Small, for the defendant.

[18TH NOVEMBER, 1895.]

MORRIS v. CONFEDERATION LIFE ASSOCIATION.

Parties—Name used without authority—Solicitor—Judgment—Relief—Laches—Repayment of moneys.

A person who finds himself a party plaintiff to proceedings which he has never authorized is entitled to be relieved from

liability in connection with them, whether the solicitor in fault be solvent or not; and the fact that an order dismissing the action has been issued before the applicant becomes aware that his name has been used makes no difference in the rule.

Nurse v. Durnford, 13 Ch. D. 764, followed.

Delay in moving to set aside the proceedings from the 1st August to the 25th September :—

Held, not a bar to relief, where no detriment had resulted to the defendants thereby.

The sheriff having seized the plaintiff's goods under execution upon an order dismissing the action with costs, the plaintiff paid the costs to the sheriff, who undertook to hold the amount for ten days, "to be returned if writ set aside, and if not within that time, to be applied in payment of execution." After the lapse of more than ten days, during which the plaintiff took no step, the sheriff paid over the money to the defendants. The plaintiff having afterwards established his right to be relieved from liability :—

Held, that he was entitled to be repaid by the defendants.

G. L. Lennox, for the plaintiff T. R. Morris.

Snow, for the defendants the Confederation Life Association.

[19TH NOVEMBER, 1895.]

In re BABCOCK v. AYERS.

Prohibition—Division Court—Increased jurisdiction—Promissory note payable by instalments—Ascertainment of amount.

The following instrument was signed by the defendant :—
 "Burlington, Sept. 21, 1885. \$400. Received from Wm. E. Babcock the sum of four hundred dollars, which we promise to pay him or his order as follows: in three annual instalments with interest at 6 per cent. *per annum*, for value received."

Held, that a promise to pay a sum in "three annual instalments" is equivalent to "three equal annual instalments," and the instrument was a promissory note payable by instalments, upon each of which an action would lie at its maturity; also that each instalment was for an amount ascertained by the signature of

the defendant; and a Division Court had jurisdiction to entertain an action for the first instalment begun before the second became due.

Motion for prohibition refused.

Raney, for the plaintiff.

A. McLean Macdonell, for the defendant.

[THE MASTER IN CHAMBERS, 28RD NOVEMBER, 1895.]

BROOKS v. GEORGIAN BAY SAW-LOG SALVAGE CO.

Referee—Report—Payment of fees.

Upon a reference under s. 102 of the Judicature Act, the referee apportioned the amount of his fees between the plaintiffs and defendants according to the time occupied by each upon the reference. The plaintiffs paid their share, but the defendants did not.

Held, that the referee should issue his report to the plaintiffs without further payment by them, and look to the defendants for their share of his fees.

Kilmer, for the plaintiffs.

James Bicknell, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

REGINA v. DOYLE.

Criminal law—Indictment for breaking and entering—Form of—"Against the form of the statute in such case, etc.," omitted.

A motion was made to quash an indictment for breaking and entering with intent to steal, and for stealing certain goods described, because, charging statutable offences, it did not con-

clude with the words "against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, Her Crown and Dignity."

Held, that the indictment was good.

REGINA v. JOHNSTON.

Liquor License Act—Appeal from conviction under—Affidavit—Bond—Requirements—Charge as to which defendant has been acquitted—Information and belief—Grounds of—Jurisdiction—Presumption.

An appeal to the County Court from a conviction for a violation of the Liquor License Act of 1886 was set aside by the Judge of the County Court for irregularity, the ground being that the affidavit for the appeal did not contain the words "that he will not sell, etc."

Held, that this allegation was not required to be made in the affidavit, but in the bond.

The affidavit did not negative both charges contained in the information.

Held, that this was not necessary, the defendant having been acquitted of one of the charges.

An affidavit of information and belief should state grounds.

The fact that a Judge grants a summons affords some ground, in a doubtful case, for the presumption that he was acting within his jurisdiction.

McDONALD v. MORRISON.

Principal and agent—Excess of authority—Acquiescence—Ratification.

The plaintiff authorized McD. to sell two horses. McD., instead of selling, exchanged one of the horses with the defendant for another horse and a sum of money. The money was paid over to the plaintiff's wife, and there was evidence tending to show that she informed her husband of the facts. There was no denial on his part that he had knowledge. The exchange

was made in December, and the horse taken in part payment remained on the plaintiff's premises all winter. The plaintiff returned home in the latter part of March, and did not take steps to rescind the transaction until some time in June.

Held, that there was acquiescence amounting to ratification.

In re ROSS.

Appeal from decision of Judge at Chambers—Matters not originating in the Supreme Court—Costs—Order 57, Rules 4 and 17.

An order was made at Chambers increasing the amount allowed by appraisers for damages for loss of water resulting from the works of the Dartmouth Water Commission.

Held, that this was not "a matter originating in the Supreme Court" within the meaning of Order 57, Rule 17, and that consequently there was no appeal.

Appeals from judgments, etc., made by Judges in Court or at Chambers, provided for by Order 57, Rule 4, are by Rule 17 of the same Order restricted to matters originating in the Supreme Court.

The question having been brought before the Court for the first time, no costs were allowed.

FREEMAN v. McLEAN.

Sheriff—Sale of land under execution—Right to retain fees where sale not completed.

Lands were sold by the sheriff of the county of S. at public auction, under execution on a judgment obtained against F. *et al.*, and were knocked down to the plaintiff as the highest bidder. After the sale and payment of the usual deposit of ten per cent., it was agreed between the plaintiff and the judgment creditors that the sale should not be completed, and that the money paid should be returned.

Held, that the sheriff was entitled to retain the percentage fixed by the schedule of sheriff's fees on the amount for which the property was knocked down.

Quære, where the sale proves abortive through no act of the judgment creditor.

Semble, that the position and rights of the sheriff are not different in principle from those of an auctioneer employed to sell land.

BAKER v. WAMBOLT.

Gaming—Race—Bet—Loan of money for illegal purposes—Action to recover—Plea of illegality—Power of Court in absence of—Public policy—Amendment—Costs.

The plaintiff lent a sum of money to the defendant to bet on D., one of the contestants in a race. An arrangement was made with L., the other contestant, that he should lose the race, thus enabling D. to win the money. L. was unable to carry out the arrangement, and the plaintiff sued to recover his money. There was no plea of the illegality of the purpose for which the money was lent.

Held, following *Whitmore v. Farley*, 14 Cox C. C. 617, that the Court could, of its own motion, have refused to entertain the case, as one in which, on considerations of public policy, neither party should be aided.

That defendant should not be allowed to set up his own illegal conduct without plea.

That the ends of justice would be met by allowing the defendant to amend, allowing his appeal without costs, and entering judgment in his favour without costs.

HUBLEY v. MORASH.

Promissory note—Settlement of claim for assault on infant—Consideration—Authority of parent—Right of infant to disaffirm settlement—Voidable contract.

In an action against the defendant on a promissory note given by him in satisfaction of a claim for damages in connection with an assault committed upon the plaintiff's son, a minor:—

Held, that the father being the agent of the son and having authority, and being so recognized by the defendant, there was consideration for the note.

Lyons v. Donkin, 28 N. S. Reps. 258, followed.

That the agreement by which the claim of the son was settled was a transaction voidable only by him.

In this class of cases the right to treat the contract as voidable exists exclusively as a means of protection to the infant, and is, until disaffirmed by the infant, binding upon the other party, who is to be regarded as having bound himself with due consideration.

In re BURKE.

Canada Temperance Act—Summary conviction—Imprisonment in default of fine—Common gaol nearest the locality where order made—Protection of constable in execution of warrant.

B. was convicted by the stipendiary magistrate for the municipality of Springhill, in the county of Cumberland, of a violation of the Canada Temperance Act, and fined. In default of payment of the fine a warrant was issued directing a constable of the municipality to take B. and convey him to the common gaol at Amherst, and there deliver him to the keeper thereof. There was a lock-up, or room, for the temporary detention of prisoners at Springhill, but no "common gaol" or prison, in which prisoners were usually confined.

Amherst was the county town of the county of Cumberland, and the "common gaol" of the county, nearest the locality where the order for imprisonment was made, was situated there.

Held, that the imprisonment was properly ordered.

Also, that the constable, in the execution of the warrant, was protected in conveying the prisoner beyond the boundaries of the municipality to the gaol at Amherst: Interpretation Act, R. S. C. c. 1, s. 7, s.-s. 38; Criminal Code, part 1, s. 3.

In re CONSUMERS' CORDAGE CO.

Assessment and taxes—Towns Incorporation Act, 1888, ss. 111, 117—Assessment Appeal Court—Evidence given on oath—Personal knowledge of value.

A decision of the Assessment Appeal Court of the town of D.,

affirming a valuation by assessors, was attacked as made without jurisdiction, on the ground that evidence was given before the Court to the effect that the valuation was excessive, and no evidence was given to rebut it.

Held, affirming the decision of McDONALD, C.J., refusing a writ of *certiorari*, that the members of the Assessment Appeal Court were not confined, as a basis for their conclusions, to evidence given before them on oath, and that the personal knowledge of the values of property in their district, which they might be supposed to have, might be regarded as constituting part of the material upon which they might proceed in disposing of appeals before them: Towns Incorporation Act, 1888, ss. 111, 117.

GRESHAM v. TOWN OF SYDNEY MINES.

Municipal corporations — Transient merchants and peddlers—License fee payable by—By-laws relating to—Special instructions—Arrest in excess of authority—New trial.

The town council of S., having authority to make by-laws in respect to the peddling of goods, requiring a license, and fixing penalties, passed resolutions: (a) that transient merchants and peddlers be charged a license fee at the rate of \$4 per month; (b) that the policemen be instructed to see that all transient merchants and peddlers who have not provided themselves with licenses be hindered from selling.

The plaintiff was arrested by a policeman of the town, who had verbal instructions to seize his horse and waggon for carrying on business in violation of the by-laws.

Held, that the arrest was in excess of the policeman's authority, any ambiguity as to the meaning of the word "hinder" having been removed by the special instructions given. There being no apparent miscarriage of justice, the jury having negatived the authority to make the arrest, the evidence justifying them in doing so, and there being no appeal against the finding, or motion for a new trial, the Court refused to grant a new trial of its own motion.

SHERRY v. WADDELL.

Contract—Action by legatee under will for services rendered testator—Finding that services were not to be paid for in wages—Person living as member of family—Circumstances and admission—Power of Judge to infer contract.

The plaintiff lived with W. during the last eight years of his life, and was treated as one of the members of his family. On 24th April, 1894, W. paid the plaintiff the sum of \$1,000, taking a receipt in full to that date for her services, and for all or any demands of any kind or nature she might have against him. Six days later W. executed his will, in which he bequeathed to the plaintiff a legacy of \$2,000. On the 7th November following he executed a codicil to his will and bequeathed plaintiff a further sum of \$2,000. The plaintiff sued the executors of W. for services rendered the deceased between the date of the receipt of 24th April, 1894, and the date of his death. A witness called on behalf of the plaintiff swore that the plaintiff told him shortly after the death of W., or after the will had been read, that “deceased intended to make her as one of the family when he made his will, and that was the reason she stayed with him.” No contradiction of this statement was offered by the plaintiff.

Held, affirming the finding of the trial Judge, that the silence of the plaintiff, coupled with the circumstances proved, afforded sufficient ground for the finding that the services subsequent to the date of the payment and receipt were not to be paid for in wages.

It is as open to a Judge as it would be to a jury to infer a contract from circumstances and admissions proved before him.

Stewart v. Mott, 23 S. C. R. 388, followed.

VANTASSEL v. TRASK.

Canada Temperance Act—Conviction for violation—Warrant of commitment—Constable executing may break and enter—No demand necessary where officer enters a second time in pursuit—Irregularity in warrant—Officer protected notwithstanding—Notice of action.

The defendant, a policeman of the town of D., was intrusted with the execution of a warrant of commitment by the stipendiary

magistrate for D., on a summary conviction of the plaintiff for a violation of the Canada Temperance Act. The defendant went to the plaintiff's house and demanded admission, stating that he had a Scott Act commitment against the plaintiff. After waiting a reasonable time, and admission being refused, the defendant broke and entered.

Held, that he was justified in doing so; for a prosecution of this nature constitutes a criminal case: *Regina v. Calhoun*, 20 N. S. Reps. 325.

The plaintiff evaded arrest in the first instance by escaping from the house. The defendant returned in pursuit and entered.

Held, that a further demand was unnecessary under such circumstances.

The warrant under which the defendant acted contained no provision for payment of the costs of conveying to gaol.

Held, assuming this to be an irregularity, that the defendant was still protected.

Held, further, *per* McDONALD, C.J., and TOWNSEND, J., that notice to the constable was a condition precedent to the bringing of the action.

LOASBY v. EGAN.

Infant—Appointment of guardian—Must be in writing—Power of Judge of Probate to change at request of infant—Age at which infant becomes competent to choose—Trustee for infant—How appointed—Naked trust—Money payable under.

L. insured his life for the benefit of the plaintiff, his daughter, in the Home Circle Insurance Society.

He verbally requested the defendant to act as the plaintiff's guardian, and at his instance the money payable under the policy was made payable to the defendant in trust for the plaintiff.

On the death of L., the defendant applied for and obtained letters of guardianship of the plaintiff's person and estate.

Subsequently, on the application of the plaintiff, who had attained the age of 14 years, the letters to defendant were

revoked, and letters of guardianship of the person and estate were granted to B., who was the plaintiff's grandfather.

Held, that the appointment by L. of the defendant as guardian of the plaintiff should have been in writing.

That if it was the intention to create a trust in the defendant until the plaintiff arrived at the age of 21 years, it could not prevail unless expressed in writing.

That the trust, as set out in the policy, was merely a naked trust, under which the money would be payable to the *cestui que trust*, if of age ; otherwise to the guardian.

That the Judge of Probate had authority to change the guardian at the instance of the plaintiff.

That the appointment of the grandfather for that purpose was a proper one.

MANLEY v. GILLESPIE.

Malicious arrest—Instructions to jury—Questions submitted—Reasonable and probable cause.

In an action for malicious arrest, it appeared that the defendant had a claim against the plaintiff, not amounting technically to a debt, and that he made an affidavit for a *capias*, under which the plaintiff was arrested, the defendant believing in good faith that he was entitled to do so.

The presiding Judge charged the jury that any person having a legal claim against another has a right to pursue it to the full extent that the law allows, if he does it *bona fide* and without malice, and, further, that the fact that the defendant had probably mistaken his cause of action formed no ground for such action as this.

He submitted questions as to whether the circumstances were such that a reasonably fair person would have acted on them ; and as to whether the defendant acted *bona fide*, which the jury answered in the affirmative ; and as to the existence of malice, which the jury answered in the negative.

In connection with the questions the learned Judge instructed the jury that if they answered the first set of questions in the affirmative and the last in the negative, their verdict should be for the defendant.

Held, that the Judge determined, as a matter of law, that there was not a want of reasonable and probable cause, and that the mode of summing up was reasonable and proper.

Held, also, that the verdict being a general one, the course pursued by the Judge in submitting questions and directing what the verdict should be was unobjectionable.

WARNER v. SYMON-KAYE SYNDICATE.

CUNARD v. SYMON-KAYE SYNDICATE.

Promissory notes—Bills of Exchange Act, 1890, s. 86—Note payable at particular place—Presentment—Allegation and proof—Special indorsement—Motion for summary judgment—Affidavit—Amendment—Costs.

A promissory note, made by the defendant company in favour of the plaintiff, was drawn payable to the order of the plaintiff at the Union Bank.

Held, that the note must be presented at the place indicated in the body of it in order to render the maker liable.

Bills of Exchange Act, 1890, s. 86, considered.

On application for summary judgment, before defence pleaded, there was no allegation or proof of presentment at the place indicated in the body of the instrument, the allegation being merely that the note was presented for payment and dishonoured.

Held, that a more explicit statement was required.

Held, also, that the case was a proper one for amendment; the plaintiff to have leave to amend on payment of costs of the appeal; costs below to abide the event of the application.

Semble, that if the allegation of presentment had been made in the special indorsement, a general clause in the affidavit referring to the indorsement and verifying it would have been sufficient.

The defendant company, by their promissory note, promised "to pay to the order of C. & Co. (plaintiffs) at H. \$212.35."

Held, following *Spindler v. Grellet*, 1 Ex. 384, that the note was one payable at a particular place, and that presentment at

that place must be alleged and proved to enable the plaintiff to recover.

But, following the previous case, that the plaintiff should be allowed to amend on payment of costs.

RODENHISER v. CRAGG.

Liquor License Act—Conviction for violation of—Fraudulent sale to evade seizure under warrant—Change of possession—Married woman carrying on business apart from husband—Failure to comply with provisions of Married Women's Property Act—Effect of—Authority of wife to sell—Extent of—Seizure of husband's property under warrant against wife.

The defendants seized and carried away under a distress warrant, issued against A. on a conviction for a violation of the Liquor License Act, a quantity of goods of which the plaintiff claimed to be the owner as purchaser from A. The plaintiff was a sister of A., and had lived with her prior to the conviction, and assisted in carrying on the business. The alleged sale was made on the evening of the 9th June, pending the proceedings against A., and immediately before the making of the conviction. The consideration was a small payment in cash, said to have been borrowed from the plaintiff's mother, who was also the mother of A., and three promissory notes. Neither in connection with the alleged sale nor afterwards did it appear that the plaintiff did any act in relation to the goods different from what she had previously done.

Held, affirming the judgment of TOWNSHEND, J., that the sale to the plaintiff under the circumstances was a fraudulent attempt to transfer the property for the purpose of defeating the warrant, and was void as against the defendants seizing under the warrant.

That, the sale being fictitious, the acts of the plaintiff must be regarded as referable to the relationship previously existing; that the plaintiff must be regarded as the servant of A.; and that, consequently, there was no change of possession which would enable the plaintiff to maintain the action.

At the time of the conviction and the seizure under the warrant, A. was a married woman carrying on business separately from her husband, but had not complied with s. 52 of the

Married Women's Property Act by registering the consent in writing of her husband to her acquiring separate property.

Held, that the property was that of the husband.

Also, that the only authority in the wife to sell which could be implied from the way in which she was doing business, was to sell goods at retail in the ordinary way of business, and would fall short of authority to sell the whole stock in one lot.

Per RITCHIE, J., dissenting, that until the sale was repudiated by the husband, the position of the plaintiff was not affected by the alleged want of authority of A.

That defendants were not justified under a warrant against A. in taking property which did not belong to her.

MALCOLM v. HARNISH.

Contract—Agreement to cut and deliver pulp wood—Advances made on account—Provision vesting ownership in wood when cut—Appropriation—Delay in asserting claim—Lien—Delivery.

B. *et al.* contracted to furnish and deliver to W., on board scows at the foot of Allan River, 1,000 cords of spruce pulp wood cut into four-foot lengths, for which W. agreed to pay \$2.50 per cord, payable, \$1 when the wood was delivered on the lake, 50 cents when the wood was driven to the mouth of the river, and the balance when the wood was delivered on the scows. It was further agreed that, in consideration of the advances, the ownership in the wood was to be in W. from the time it was first cut in the woods.

The agreement between W. and the contractors was transferred to the plaintiff, who furnished supplies and made advances, basing the amounts of the payments upon the quantity of logs cut, including logs cut into pulp-wood lengths and logs which he assumed would be so cut. There was evidence that the plaintiff knew that the contractors were cutting logs for the defendant, and recognized their right to do so, and that some of the logs so cut were of hemlock, pine, and fir, while the agreement in relation to the pulp wood called for spruce.

The contractors failed to deliver pulp wood to cover the amount of the plaintiff's advances, and the plaintiff claimed a

quantity of saw logs sold and delivered to the defendant, on the grounds : (a) that under the terms of the agreement they became his property as soon as they were felled ; (b) that the plaintiff went to the woods where the work was going on, and, with the assistance of the contractors, made estimates of the number of cords of pulp wood the trees cut would amount to, and made advances accordingly, and that this vested the property in him so as to enable him to maintain the action.

Held, that the trees cut in whole or in part for saw logs would not come under the provision of the agreement vesting the ownership in the plaintiff from the time the wood was first cut ; that in order to bring all the logs on the grounds under the provision as to the passing of property, it would be necessary for the contractors to appropriate all the logs there to that agreement ; that, in the absence of such appropriation, the mere counting of the logs by the plaintiff as if they were all for pulp wood would not have any legal effect.

There was evidence that the plaintiff's claim was not asserted until he found that the quantity of pulp wood delivered was not sufficient to cover the amount of his advances.

Held, that this was inconsistent with the idea that the property had passed previously.

There can be no appropriation, by way of lien, of chattels susceptible of delivery, which will prevail against other persons, without a delivery good at common law.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 5TH NOVEMBER, 1895.]

GILES v. McEWAN.

Master and servant—Verbal contract—Non-performance within a year—Joint action on separate causes of action—Nonsuit.

County Court appeal. The plaintiffs, husband and wife, sued the defendant on a demand, stated in the summons as follows:—"1895, April 28. To one year's wages, \$400," giving credit for various sums, amounting to \$190, leaving the actual amount claimed \$210. The County Court Judge considered that it was doubtful if the plaintiffs could recover upon the contract of hiring which they set up, but he held that they were entitled to recover for the time they served on a *quantum meruit*, and entered a verdict in their favour for \$207.80. Against this the defendant appealed.

The plaintiffs stated that the defendant on the 16th April, 1894, hired them for one year at \$400 a year, with free house and fuel.

The defendant contended that, even if the hiring was for one year, the agreement was a verbal one, not to be performed within one year from the making thereof, and therefore they could not, under the Statute of Frauds, sue upon it.

The hiring took place on 16th April, but the plaintiffs were not to go to work till they received a letter from the defendant. When they received that letter from the defendant, they started for his place on the 26th April, 1894, and reached there on the 28th. They worked until the 26th April, 1895.

The agreement was a verbal one, and one witness stated that there was nothing said as to when the year was to commence.

On the appeal the plaintiffs contended that the defence of the Statute of Frauds could not be taken advantage of, because it had not been raised by the dispute note; and further, as the plaintiff had served for a complete year, the agreement was taken out of the statute and they could recover upon it.

Held, that upon the evidence it did not appear that the term of service was to begin earlier than, certainly, at the time when the plaintiffs received the letter from the defendant telling them to come. If so, the agreement was one not to be performed within the space of one year from the making thereof.

It was not certain upon the evidence whether the defendants served a full year or not.

It was not necessary to plead the Statute of Frauds specially, as the general issue placed upon a plaintiff the onus of proving a contract in fact: *McMillan v. Williams*, 9 Man. L. R. 627.

While it was claimed that the plaintiffs performed a year's service, and so the agreement was not within the statute, there could be no pretence that they performed the year's service within one year from the making of the agreement.

The plaintiffs could not maintain the present action upon a contract. The question was whether they could sue jointly, as they did here. That there was a joint hiring could not be inferred in any way from the nature of the employment. The husband was the farmer and managed the farm, the outside work. The wife was the housekeeper, the domestic house servant of the defendant and his wife. There was no joint service whatever. The right then to bring a joint action could depend only upon the original contract. But that could not be relied on. The plaintiffs could not resort to that, but must make out their cause of action entirely independent of it. They had two separate and distinct causes of action for which they must sue separately: *Crumbie v. McEwan*, 9 Man. L. R. 419.

Appeal allowed with costs, and a nonsuit entered in the County Court action.

Bradshaw, for the defendant.

West, for the plaintiffs.

WELLS v. McCARTHY.

Promissory note—Indorsement as sureties—Order of indorsements.

County Court appeal. The plaintiff sued on a promissory note made by J. Harvey, in favour of J. L. Wells & Co., indorsed, as shown on the note, in the following order, G. A. McCarthy, J. L. Wells & Co., J. T. Harvey, and J. L. Wells.

At the trial a nonsuit was moved for on the ground that J. L. Wells & Co. being the payees, and the plaintiff being identical with J. L. Wells & Co., he could not sue the defendant, as the defendant's indorsement must be taken as subsequent to his, though actually appearing on the note as first in order.

The County Court Judge entered a nonsuit, and the plaintiff appealed.

Held, that the appeal should be allowed with costs, the nonsuit set aside with costs, and a new trial ordered.

That the name of the defendant stood upon the back of the note as first indorser, with that of the payees below it, did not affect the question. The evidence showed that the indorsation by the defendant was as surety, with the intention that he should be liable for payment of the note, and the indorsation by J. L. Wells & Co. must be a mere matter of form. It seemed clear from the evidence, so far as that had been given, that if the defendant had paid the note, he could not have recovered back the money so paid from J. L. Wells & Co., whether they and the plaintiff were the same persons or not.

Macdonald v. Whitfield, 8 App. Cas. 733, referred to.

Monkman, for the plaintiff.

Elliott, for the defendant.

[BAIN, J., 18TH NOVEMBER, 1895.]

POLLOCK v. GOLDSTEIN.

Trial—Non-appearance of defendant—Rule 654—Application to set aside verdict—Costs.

This was an application by the defendant to set aside a verdict made under Rule 654 of the Queen's Bench Act, 1895,

which provides that "any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court, or by a Judge in Court, or by a Judge at the sittings, upon such terms as may seem fit." This case had been set down for trial on 22nd October, but it was arranged between the attorneys that it should be enlarged for one week; the attorney for the plaintiffs attended the Court, and caused it to be enlarged for one week. The attorney for the defendant saw a report of the proceedings in a city newspaper in which it was stated that the case was enlarged for two weeks. On 28th October the defendant's attorney attended at the Court House and examined the list of cases set down for hearing on 29th October, and saw it was not on the list. On 29th October the plaintiffs' attorney stated to the prothonotary that the case should be on the list for that day, and the prothonotary accordingly placed it on the list for trial on that day, and subsequently at the sitting of the Court the plaintiffs' attorney, who also acted as counsel, appeared, and the case was tried and a verdict entered for the plaintiffs. The defendant's attorney did not attend at the trial, for the reasons stated, nor did he know that the case had been tried and a verdict entered until he saw an account of the proceedings at the trial in the evening papers of 29th October. It had always been the intention of the defendant to defend the action.

Held, that the defendant should be given another opportunity to make his defence. The costs of the application to be costs to the plaintiffs in the cause.

Bonnar, for the plaintiffs.

Andrews, for the defendant.

BERTRAND v. HEAMAN.

Attachment of debts—Assignment by judgment debtor for benefit of creditors—Issue between assignee and garnishing creditor—Evidence—Admissions by judgment debtor.

The plaintiff was the assignee under an assignment for the benefit of creditors made by James Heaman, and claimed that \$88 paid into Court by the garnishee, which was the balance of

the purchase money of a car load of wheat bought by the garnishee from Heaman, was part of the estate that passed to him under the assignment. The balance of the purchase money was garnished by R. E. Heaman, under a judgment against James Heaman.

On 26th November, 1894, one Albert Fenwick borrowed \$200 from James Heaman, and on 21st December following Fenwick sold Heaman the car of wheat in question, and Heaman paid for it by applying the \$200 on the price and by paying the balance in cash. When Heaman lent Fenwick the \$200, he told him the money belonged to his estate, but that his creditors could not take it out of his pocket. Then when he bought the car of wheat he asked Fenwick to have the bill of lading made out in Fenwick's own name, as he was afraid his creditors might interfere with the wheat; Fenwick did so, and indorsed the bill to Heaman, who sold the car to the garnishee and received the price for it, with the exception of the \$88.

Held, upon the trial of an issue between the assignee as plaintiff and the garnishing creditor as defendant, that the plaintiff was entitled to judgment with costs.

Claiming the money as she did under a garnishing order, the defendant in the issue was in the same relation to the defendant in the suit that an execution creditor would be: *Cools v. Braham*, 8 Ex. 188. The defendant in the issue and James Heaman were identified in their interest in the money that was in question, and the statement that James Heaman made to Fenwick was properly admitted in evidence, under the rule that the admissions of one person are evidence against another in respect of privity between them. While the money with which the wheat was bought was in James Heaman's possession, and before the defendant had any claim to it, he made a statement that qualified or defeated his title to the money. The statement he made showed, if it were true, that the money did not belong to him, but to his creditors. The statement was an admission that was very clearly against his own interest, and as it was his interest in the money that the defendant was claiming, this admission was evidence against her.

— *Howell*, Q.C., for the plaintiff.

Bradshaw, for the defendant.

NORTH-WEST TERRITORIES

In the Supreme Court.

[SCOTT, J., 5TH MARCH AND 17TH MAY, 1895.]

REGINA *ex rel.* VANDECAR v. HOGAN.

REGINA *ex rel.* WEST v. AMBLER.

Courts—Single Judge in Court—Motion for quo warranto—Jurisdiction—Objection—Costs.

On the 5th March, 1895, S. S. Taylor, Q.C., for the relators, moved before Scott, J., at the Edmonton sittings, on notice to the defendants, for an order that an information in the nature of a *quo warranto* be exhibited against the defendants, to show by what authority they and each of them claimed to exercise the office or franchise of a school trustee.

N. D. Beck, Q.C., for the defendants, objected that a single Judge had no power to entertain the motion: under the English practice such an application must be made to a Divisional Court: Crown Office Rule 51; Shortt on Informations, p. 160.

Scott, J., sustained the objection and dismissed the application.

Beck then asked for costs. *Cur. adv. vult.*

17th May, 1895. Scott, J.—I reserved the question whether, in the absence of authority to grant the writs, I could award costs to the respondents in respect to this application.

Following *Re Bombay Civil Fund Act, Pringle v. Secretary of State for India*, 40 Ch. D. 288, I now hold that I have authority to award costs to the respondents.

There is no question as to the jurisdiction of the Court to entertain the application, but merely one as to whether the application was properly made to it.

The respondents' costs, to be taxed, must therefore be paid by the relators.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[ROULEAU, J., 2ND NOVEMBER, 1895.]

FARR v. O'NEILL.

Security for costs—Interpleader — Defendant in issue—Summons — Preliminary objections—Enlargement.

The plaintiff in an interpleader issue, directed on the application of a sheriff (see *ante* p. 345), obtained a summons calling upon the defendant in the issue, the execution creditor, to show cause why he should not give security for costs, on the ground that he resided out of the jurisdiction.

Held, that a party summoned to show cause must be ready on the return to file his affidavits in answer on the merits, as well as to argue preliminary objections. If not ready to file his affidavits, he may, in order to preserve his right to raise preliminary objections, state such objections and ask for an enlargement to file his affidavits.

It was contended by the defendant that the plaintiff in the issue was not only in that position on the record, but was substantially and really the plaintiff, and therefore the defendant should not be required to give security for costs.

Held, however, that the defendant should give security for costs.

Tomlinson v. Land and Finance Corporation, 14 Q. B. D. 539, followed.

P. McCarthy, Q.C., for the plaintiff.

C. C. McCaul, Q.C., for the defendant.

ONTARIO.

—
Supreme Court of Judicature.

COURT OF APPEAL.

5TH D.C., OXFORD.] [MACLENNAN, J.A., 9TH DECEMBER, 1895.

ARMOUR v. IMPERIAL BANK OF CANADA.

Banks and banking—Deposit receipt—Payment on notice—Statute of Limitations—Gift inter vivos or mortis causa—Evidence.

Appeal by the plaintiff from the judgment of the 5th Division Court in the county of Oxford dismissing the action, which was brought to recover \$100 on a deposit receipt, dated 30th October, 1877, issued by the bank at Ingersoll to Catherine McAulay, who died on 27th February, 1879, intestate.

Letters of administration were granted to the plaintiff, a sister of Catherine, on 28rd January, 1890, and this action was begun on 17th January, 1894.

On 30th October, 1879, Mary McAulay, another sister, brought the receipt to the bank, and, at her request, the bank paid her \$10, the interest which had accrued during the two years, and exchanged the original receipt for a new one, in precisely the same terms as before, with the exception of the date, and expressed to be in the name of Catherine, who had then been some months dead. On 10th July, 1882, Mary went again to the bank and received payment of the money and accrued interest, giving up the receipt, and also giving the bank a bond of indemnity by two sureties. Mary died on 23rd April, 1883, and the bank heard no more of the matter until this action was brought.

When the deposit receipts were produced, both of them were found to have an indorsement upon them of the name and mark of Catherine, attested by a teller in the bank. The indorsement upon the receipt of 1879 was scored out, and beneath was an indorsement of the name and mark of Mary, attested by one Walsh, directing payment to Richard Wilson or order. There was no evidence of when or under what circumstances any of these indorsements were made. Both Catherine and Mary were elderly unmarried women, both illiterate, and they lived together in a cottage at Ingersoll. It was probable that the bank clerks did not know one sister from the other, and that when Mary brought the receipt in October, 1879, they supposed she was Catherine.

Held, that the money was Catherine's when deposited, there being no evidence to the contrary; and, as, by the terms of the receipt, it was payable only upon fifteen days' notice, which was not given, the Statute of Limitations had no application; and unless it could be made out that Mary had acquired some title from her sister in her lifetime, the defendants must be liable.

The Court below found that there had been a gift by Catherine to Mary in her lifetime, and it was contended upon the appeal that there was either a gift *inter vivos* or a gift *mortis causa*.

Held, following *Mander v. Royal Canadian Bank*, 20 C. P. 125, that such a deposit as this could be transferred in equity by an agreement, for valuable consideration, without any actual assignment, but there was no evidence of any such agreement here; and, following *Lee v. Bank of British North America*, 30 C. P. 255, that a mere indorsement of the receipt was in itself insufficient to pass the title; and there was therefore no valid gift *inter vivos*.

It might, however, have been validly transferred *mortis causa* even without indorsement: *Ellison v. Ellison*, 6 Ves. 656; *Edwards v. Jones*, 1 My. & Cr. 226; *Gott v. Gott*, 9 Gr. 165; but the evidence fell far short of what was necessary to establish such a gift: *Cosnahan v. Grice*, 15 Moo. P. C. 215. The evidence was that the sisters lived together in terms of great confidence; that they were living together at the time of Catherine's death; and that the latter used to say that whichever of them lived the longest was to have what money was left.

Appeal allowed and judgment to be entered for the plaintiff for the amount of the deposit, with interest, and costs both here and below.

J. B. Jackson, for the plaintiff.

Shepley, Q.C., for the defendants.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE JUSTICES IN BANC, 14TH DECEMBER, 1895.]

REGINA v. VERRAL.

Evidence—Prosecution for indictable offence—Foreign commission—Order for—Time—Preliminary inquiry—Use of evidence—Criminal Code, s. 683—Return of commission.

Section 683 of the Criminal Code is merely an extension of the provision made by s. 681 for procuring the evidence of a person dangerously ill, to the procuring of the evidence of a person residing out of Canada.

Section 681 had its origin in 43 V. c. 85, and, reading its provisions in the light of the preamble to that Act, it is clear that the statement for the taking of which provision is therein made may be used as evidence at any stage of the inquiry relating to an indictable offence.

The time at which an order may be applied for under s. 683 does not differ from that under s. 681; the kind of evidence to be given in each case is substantially the same; and the words "for which a prosecution is pending" in s. 683 do not differ it from s. 681.

The order of *MACMAHON*, J., 16 P. R. 444, allowing the Crown to issue a commission to take evidence abroad, pending the preliminary inquiry before a police magistrate upon an information against the defendant for an indictable offence, was applied for and obtained at a proper time and under circumstances warranting the application and order; and, although the

use to be made of the evidence to be procured under it could not affect its validity, such evidence might be used at any stage of the inquiry at which evidence might be given relating to the offence or to the accused—a provision enabling it to be used as well before the grand jury as at the trial not preventing its being used at any other time, if required.

The order, however, should provide that the commission be returned into the High Court, and ought not to limit the use of the evidence.

Biggs, Q.C., for the defendant.

J. W. Curry, for the Crown.

[BOYD, C., 10TH DECEMBER, 1895.]

HUNTER v. STARK.

Counterclaim—Recovery of land—Joinder of causes of action—Rule 341—Mortgage action—Leave.

A counterclaim for the recovery of land is an action for the recovery of land, within Rule 341 as to joinder of causes of action.

Compton v. Preston, 21 Ch. D. 188, followed.

And a counterclaim for foreclosure and recovery of possession of mortgaged premises is within the exception contained in Rule 341 (a).

And where the plaintiff sought a mortgage account and redemption, and the defendant counterclaimed for foreclosure and possession :—

Held, that if leave were necessary, it was a proper case for granting it, the rights being correlative.

B. E. Swayzie, for the plaintiff.

Heighington, for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 5TH DECEMBER, 1895.]

FERGUSON v. TOWNSHIP OF SOUTHWOLD.

Municipal corporations — Negligence — Way — Want of repair — Overhead obstruction — Liability — Finding of jury — Contributory negligence — Damages.

If something exists or is allowed to remain above a highway which interferes with its ordinary and reasonable use, this constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway.

A branch of a tree growing by the side of a highway extended over the line of travel at a height of about eleven feet. The plaintiff, in endeavouring to pass under the branch on the top of a load of hay, was brushed off by it and injured.

Held, that the jury having found that the highway was out of repair, and the defendants having had notice of the position of the branch, they were liable, in the absence of contributory negligence.

Embler v. Town of Wallkill, 57 Hun 884, specially referred to.

The question whether a highway is out of repair is a question for the jury.

Derochie v. Town of Cornwall, 21 A. R. 279, followed.

It appeared by the evidence that the plaintiff had hauled hay upon this road and past this particular place not long before; that he and another man who was on the load with him, when approaching the branch, observed the situation, but concluded they could pass in safety; that the other man did pass safely under the branch; and that the plaintiff, instead of lying close to the hay, put up his feet to raise the limb, which he failed to do.

Held, that the plaintiff was not called upon to do the very best and wisest thing; and upon this evidence, the Court could not interfere with the finding of the jury that the accident might not have been avoided by the exercise of reasonable care on the part of the plaintiff.

Connell v. Town of Prescott, 22 S. C. R. at pp. 162-3, referred to.

Held, also, upon the evidence, that the sum assessed as damages, \$1,200, was not so excessive as to warrant the Court in interfering.

J. M. Glenn, for the plaintiff.

Osler, Q.C., and *James A. McLean*, for the defendants.

McCULLOUGH v. ANDERSON.

Damages—Negligence—Evidence—Jury—Excessive damages.

This was an action to recover damages for injuries received by the plaintiff, while in the service of the defendants as a farm hand, from the kick of a horse. At the trial the jury found for the plaintiff and assessed the damages at \$800.

A motion by the defendants to set aside the verdict and dismiss the action or for a new trial was refused, ROBERTSON, J., dissenting.

Upon the question of damages the following observations were made by—

FERGUSON, J.—It was also contended that the damages awarded are excessive in amount. As the authorities stand at present, it is, I think, in the power of the Court to interfere where the damages are plainly excessive in amount, and the Court can see that such interference would be right and necessary to the ends of justice between the parties; but I do not see the way to interfere, or that the Court should interfere, in the present case. All the evidence as to the extent of the injury sustained by the plaintiff and the circumstances in which he received the injury went fairly and properly to the jury. Some of the evidence was intended to show, and went to show, that the injury was not of a serious character, and that part of the plaintiff's suffering, inconvenience, expenses, and loss was attributable to a former injury received by him. Some of it went to show that the injury was of a serious character, and that his suffering, inconvenience, expenses, and loss were not in any part or degree attributable to a former injury received by him. The jury, with all this before them, assessed the damages at a sum which,

when the circumstances and surroundings of the parties are considered, appears to be large, it is true, but, as I think, not so large as to be unconscionable, or to shock one's ideas of right and wrong. It is not a case in which any legal measure of damages is afforded by which the Court can say that the jury was wrong.

Clute, Q.C., for the defendants.

C. E. Lyons and *M. Wright*, for the plaintiff.

HENDERSON v. HENDERSON.

Limitation of actions—R. S. O. c. 111, s. 5, s.s. 1; ss. 13, 14, 15—Purchase of farm—Possession by son of purchaser—Payment of mortgage—Contribution by son—"Profits of the land"—"Rent."

In March, 1881, the testator purchased a farm and had it conveyed to himself. In April, 1881, one of his sons, with the testator's assent, given after a conference with his other sons, went into possession of the farm, upon an understanding that he should contribute such sum as could be spared off the farm, after its yielding a living to him, towards payment of the mortgage thereon, until the mortgage should be paid, when he was to have the farm. He continued in actual possession and occupation from April, 1881, till his death in November, 1892. He contributed in all \$1,900 towards payment of the mortgage, and with his contributions and payments made by his father, the mortgage was paid off, after which he asked his father for a conveyance. His father declined, but said he would leave him the farm by will. He died before his father, leaving all his property by will to his wife and child. After his death his father made a will leaving the farm to the plaintiffs, and died in 1894, the son's widow continuing in possession. In an action of ejectment brought against her by the plaintiffs:—

Held, MEREDITH, J., dissenting, that on the purchase by and conveyance to the father of the farm, the law put him into possession of it, there being no other person in possession in fact; that when the son went into possession, the father's possession ceased, and he was not thereafter in receipt of the "profits of the land," within the meaning of s. 5, s.-s. 1, of the Real Property Limitation Act, R. S. O. c. 111; that the son was

not a tenant from year to year nor a lessee, and the money he contributed was not "rent," within the meaning of s. 14; nor was such money "rent" or "profits of the land," within the meaning of s. 5, s.-s. 1, or in any way; and there being no acknowledgment by the son in writing within the meaning of s. 18, nor anything else which could stop the running of the statute, the title of the father was extinguished, under s. 15 of the Act, at least six months before the death of the son.

Watson, Q C., and L. M. Hayes, for the plaintiffs.

E. B. Edwards, for the defendant.

STEPHENS v. BEATTY.

Will—Construction—"Who may then be the heirs-at-law"—Deed—Delivery—Operation—Trusts and trustees—Limitation of actions—Trusts Act, 1891, s. 13, s.-s. 1 (a), (b)—Commencement of statute—Balance in trustee's hands—Letter—Acknowledgment—Estoppel.

The father of the plaintiff's deceased husband, by his will, left all his property to trustees, of whom the defendant was the survivor, in trust to convey and transfer it, after the death of his wife, unto all his surviving children, share and share alike, and their heirs forever; and, by a codicil, directed that the share of the plaintiff's husband should not be paid over or conveyed to him, but kept invested by the trustees, and the income paid to him during his life for his sole benefit, and after his death that such share should be paid over or conveyed to those "who may then be the heirs at law of my said son," share and share alike. The property in the hands of the defendant, as surviving trustee, at the time of the death of this son was all real estate.

Held, per MACMAHON, J., the Judge at the trial, that the words above quoted signified those who would take real estate as upon an intestacy.

Coatsworth v. Carson, 24 O. R. 185, followed.

The testator died in July, 1875, and his widow before the 1st August, 1876; the plaintiff's marriage to the son took place in July, 1885; and the son died in September, 1886, leaving no issue.

By an ante-nuptial contract the son assigned and conveyed to the plaintiff all his interest in the estate of his father.

By deed dated 1st August, 1876, the children of the testator made a partition of the lands among themselves, the trustees joining in the deed, which provided that the lands thereby assigned as the share of the plaintiff's husband should be held and retained by the trustees on the trusts set forth in the codicil.

By deed dated the 2nd March, 1897, the defendant, as surviving trustee, conveyed the lands so retained to the brothers and sisters of the plaintiff's husband as his heirs and heiresses-at-law.

This deed was, on the day of its date, signed and sealed by the defendant, and delivered by him to a person acting on behalf of the grantees, and wholly left the possession of the defendant on that day, and there was nothing to show that he did not intend it to operate immediately.

Held, by the Divisional Court, that it took effect from the day of its date.

In this action, begun on the 8th July, 1898, the plaintiff sought an account of the defendant's dealings with the estate of the testator, and a transfer and conveyance to her of her husband's share. The defendant pleaded the Trustee Act, 1891, s. 13, s.-s. 1 (a) and (b), in bar of the action.

Held, notwithstanding that a small balance of \$6.85, ascertained as early as the 8th February, 1887, remained in the defendant's hands until the 21st July, 1887, that the statute began to run in his favour on the 2nd March, 1887,—assuming a breach of trust on that day—and the plaintiff's action was barred before it was begun.

On the 27th September, 1892, the defendant wrote a letter to the plaintiff's solicitors in which he stated that all the affairs of the estate between himself, as trustee, and the heirs were wound up "as long ago as July, 1887;" that he could not see that he had anything to do with the matter, as all properties concerning which he had any trust were conveyed to the heirs at that time; and any claim the plaintiff might think she had must be settled with them, as he had no connection with any such since the date referred to."

Held, that this was not an acknowledgment which had the effect of taking the case out of the operation of the statute.

Held, also, that the defendant was not estopped by the letter from saying that the conveyance was as early as the 2nd March, 1887.

Judgment of MACMAHON, J., affirmed.

Osler, Q.C., and *N. F. Davidson*, for the plaintiff.

Moss, Q.C., and *W. F. Kerr*, for the defendant.

[13TH DECEMBER, 1895.]

MUNRO v. ORR.

Summary judgment—Rule 739—Unconditional leave to defend.

Rule 739 was made to prevent defences being set up against good faith for the mere purpose of gaining time. Where the defendant shows a good defence, he should be allowed to defend unconditionally.

Upon a motion for summary judgment under that Rule, in an action upon the covenant for payment in a mortgage, the defendant swore that he had a good defence on the merits, and that the mortgage was signed by him on the express understanding that he was not to be personally liable. This was supported by the affidavit of another person; and it also appeared that the blanks in the printed form of covenant contained in the mortgage had not been filled up.

Held, that the defendant should have unconditional leave to defend.

Worrell, Q.C., for the plaintiff.

George P. Deacon, for the defendant.

IN CHAMBERS.

[BOYD, C., 10TH DECEMBER, 1895.]

In re GALWAY.

Devolution of Estates Act—Widow—Dower—Election—Money in Court.

Where a widow desires to take, under the Devolution of Estates Act, her interest in the proceeds of her husband's undis-

posed of real estate, in lieu of dower, she must so elect by an attested instrument in writing, pursuant to s. 4, s.-s. 2, even where the lands have been sold under an order of the Court at her instance, free from her dower, and the proceeds are in Court.

W. H. Blake, for the widow.

F. W. Harcourt, for the infants.

ASHCROFT v. TYSON.

Security for costs—Action for penalty—Rule 1244—Time—Default—Dismissal of action—Indulgence—Merits.

An order under Rule 1244 for security for costs in an action for a penalty may properly contain provisions limiting the time for giving security and for dismissal of the action, without further order, upon default; and such an order, not appealed against, is conclusive between the parties as to all its terms.

Thompson v. Williamson, 16 P. R. 868, distinguished.

The action was brought against justices of the peace to recover a penalty for non-return of a conviction of the plaintiff, the error of the defendants being merely clerical, and one not prejudicing the plaintiff.

Held, not a case in which the indulgence of extending the time for giving security should be granted to the plaintiff.

Douglas Armour, for the plaintiff.

Kilmer, for the defendants.

WHEELER v. WHEELER.

Writ of summons—Service out of jurisdiction—Alimony—Contract—Marriage—Law Courts Act, 1895, s. 28.

The right to alimony is not based on contract, but on the special statutory provisions now found in s. 29 of the Judicature Act, R. S. O. c. 44.

Alimony, when granted, is not to be classed either as "debt" or "damages," terms which define the scope of s. 28 of the Law Courts Act, 1895, providing for the allowance of service out of

the jurisdiction of a writ of summons where the plaintiff has a good cause of action upon a contract, and the defendant has assets in Ontario; it is that allowance to which a married woman is entitled upon separation from her husband.

Magurn v. Magurn, 3 O. R. 579; *Keith v. Keith*, 25 Gr. 118; and *Hooper v. Hooper*, 3 Sw. & Tr. 256, followed.

Service of writ of summons out of the jurisdiction in an action for alimony disallowed.

Watson, Q.C., for the plaintiff.

Wilkes, Q.C., for the defendant.

[14TH DECEMBER, 1895.]

REES v. CARRUTHERS.

Settlement of action—Dispute—Summary trial—Stay of proceedings—Costs.

The Court has jurisdiction to stay proceedings in any action which has been compromised, where no terms of the compromise go beyond what is in controversy in the action.

And where, in an action of slander, the plaintiff excused his non-prosecution by alleging that an agreement had been entered into between himself and the defendant by which the action was to be dropped and \$10 costs to be paid by the defendant, which agreement was denied by the defendant, an order was made directing a summary trial, or the trial by an issue upon oral evidence, of the question of the validity of the settlement; if the result should be a valid settlement, proceedings to be stayed perpetually and costs paid by defendant; if settlement invalid, action to be dismissed with costs to defendant.

Douglas Armour, for the plaintiff.

W. H. Blake, for the defendant.

[FERGUSON, J., 12TH DECEMBER, 1895.]

PORT ELGIN PUBLIC SCHOOL BOARD v. EBY.

Judgment—Power of Judge to vary—Costs.

The judgment of the trial Judge, not drawn up or entered but indorsed upon the record, was in favour of the plaintiffs.

against all three defendants with costs. Upon motion of two of the defendants, the judgment was reversed as to them by a Divisional Court. Afterwards, the other defendants moved the trial Judge to vary his judgment against them as to costs in accordance with what they considered should have been the judgment had it been against them alone and in favour of the other defendants, they being administrators, and an administration order having been made before the trial. The judgment as pronounced, expressed precisely what the trial Judge intended ; there was no clerical error, inadvertence, or oversight.

Held, that the Judge had no power to vary his judgment.

Shepley, Q.C., for the plaintiffs.

Moss, Q.C., for the defendants the Trusts Corporation of Ontario.

In the General Sessions of the Peace for the County of York.

[McDOUGALL, Co.J., 26TH NOVEMBER, 1895.]

REGINA v. RAYNOR.

Liquor License Act, s. 76—Stranger supplying liquor to minor on licensed premises—Powers of Provincial Legislature.

An appeal from a summary conviction of the defendant by the police magistrate for the city of Toronto, under s. 76 of the Liquor License Act, R. S. O. c. 194, as amended by 58 V. c. 56, s. 8, for the alleged offence of supplying with intoxicating liquor a minor under the age of eighteen years.

The section, as amended, reads : “ Any licensed person who allows to be supplied in his licensed premises, by purchase or otherwise, any description whatever of liquor to any person apparently under the age of sixteen years, of either sex, not being resident on the premises or a *bona fide* guest or lodger, shall, as well as the person who actually gives or supplies the liquor, be liable to pay a penalty of not less than \$10 and not exceeding \$20 for every such offence.”

The admitted facts were that a lad of about fourteen was sent by his adult sister to a licensed house to bring home some ale which she had previously purchased and paid for. The lad entered the hotel and there met the appellant, who was not in the employment of the hotel-keeper, and asked him to go into the bar and get the beer for his sister, which the appellant did and gave it to the boy.

An information was laid against the hotel-keeper for supplying liquor to a minor, which was dismissed, as it appeared that the bar-keeper had handed the liquor to Raynor, and did not see the lad or know that Raynor was going to hand the liquor to him.

Upon the dismissal of that case, an information was laid against Raynor, who was convicted and fined \$10 and costs, and now appealed.

The question was whether the act of a stranger in supplying liquor to a minor, even if handed by him to the minor within the precincts of a licensed house, constitutes an offence against the above section.

Haverson, for the appellant.

Caswell, for the informant.

McDOUGALL, Co.J.—To make the act of Raynor an offence *per se*, on his part, would, it appears to me, be to assume a jurisdiction not conferred upon the Provincial Legislature by the Constitutional Act. It was admitted in argument that if Raynor had supplied, *i.e.*, given, a minor liquor in his own house or in the street, he would not have committed an offence within the statute. How is his responsibility increased because he gave the liquor to a minor within the threshold of a licensed hotel?

It is said that the words "as well as the person who actually gives or supplies the liquor" cover the case. Surely not; surely those words must be read to apply to those persons only who, along with the hotel-keeper, are subject to the provisions of the Liquor License Act, and within the class of persons concerning whom the Legislature may enact laws. These would be his wife, servant, manager, and employees, and they are made equally liable with the hotel-keeper for the supplying of liquor to a minor. If the wife, servant, or employee supplied the liquor to a minor, the hotel-keeper himself would be liable to the penalty

of the section. The words "as well as" would appear to indicate that the licensee must first be liable; and then the person who actually supplied the liquor, if a person under the control of or in the employ of the hotel-keeper, is stated to be equally an offender. The person (other than the licensee) meant in the statute is some person for whose acts the licensee is in law considered to be responsible. MacCormick (the hotel-keeper) in this case was not liable for the act of Raynor, and Raynor, not being in the employ of MacCormick, is not a person within the prohibition of the statute.

To hold otherwise would be to sustain the proposition that the Provincial Legislature has power to make it an offence for any citizen to give liquor either to an adult or a minor. This would be legislating with reference to a matter entirely outside the subject of licensing or regulating the liquor traffic. The Act becomes from this point of view a mere matter of morals, and the Dominion Parliament alone possesses the authority to make such acts, if considered objectionable, statutory offences.

For these reasons I am of opinion that the conviction must be quashed and the appeal allowed, and I see no proper reason for refusing the appellant his costs of the appeal. These costs I fix at \$10.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[6TH AUGUST, 1895.]

WILEY v. WAITE.

Pleading—Exceptions to answer—Discovery.

Where substantial information is given by the answer, the Court discourages exceptions for insufficiency, and will not require minute and vexatious discovery.

Blair, A.-G., and G. L. Wilson, for the plaintiff.

Lawson, for the defendant.

SHIELDS v. QUIGLEY.

Costs—Defendant not appearing at hearing—Answer.

Where, in a partition suit, one of the defendants did not appear at the hearing, and his answer was unsupported by evidence, and assumed by the Court to be unnecessary, he was held not entitled to any costs.

[27TH AUGUST, 1895.]

In re CUSHING.

Dower—Report of commissioners—Setting off—Value.

Where commissioners to admeasure dower reported that it was difficult and not advisable to set off a portion of the lands for dower, the report was referred back to them to state the value of the dower.

Weldon, Q.C., for the petitioner.

Skinner, Q.C., for the heirs.

NEW BRUNSWICK R. W. CO. v. KELLY.

Costs—Counsel fee—Resignation of trial Judge—Application for time to answer.

A suit was heard before one of the Judges of the Supreme Court, who resigned his office before judgment on appeal was delivered. After the judgment on appeal, a counsel fee on the hearing was allowed by one of the Judges; and reliance for his authority was placed upon s. 8 of 58 V. c. 14.

Held, that there was power without that enactment to allow the fee.

The defendant moved to have the bill dismissed for want of prosecution, which motion was ultimately refused, but before the refusal, the defendant was served with the bill. As it would be unnecessary to answer if his motion to dismiss were successful, the defendant obtained a Judge's order extending the time to answer until after judgment should be given upon the motion.

The order directed that the costs of it should be costs in the cause. At the final hearing the defendant succeeded.

Held, that he was entitled to the costs of his application for time to answer.

Blair, A.-G., for the plaintiff.

C. E. Duffy, for the defendant.

[3RD SEPTEMBER, 1895.]

JOHNSTON v. JOHNSTON.

Husband and wife—Separation — Wife's property — Rights of husband — Injunction.

A married woman, the owner in fee of a lot of land, was compelled to live separate and apart from her husband, not wilfully or of her own accord.

Held; that during such separation she was entitled to an injunction restraining her husband from exercising any marital rights over the land and from interfering with its use and occupation by her.

[17TH SEPTEMBER, 1895.]

WATERS v. WATERS.

Lien—Improvements on land—Agreement—Maintenance—Substitute.

A farm was conveyed by an aged couple to their son in consideration of his agreement to maintain them thereon. On the death of the son in their lifetime, leaving a wife and infant daughter, his brother, the plaintiff, at the request of the widow and the parents, took possession of the farm and performed the agreement.

Held, that the plaintiff was entitled to a lien on the land for money expended by him in making permanent improvements thereon and in the performance of the agreement.

W. Watson Allan, for the plaintiff.

The defendants did not appear.

BARCLAY v. McANITY.

Costs—Offer to suffer judgment—Non-acceptance—Result of suit.

Where an offer by the defendant to suffer judgment in a suit involving several issues was not accepted by the plaintiff, who finally succeeded upon only one issue, which entitled him to less damages than the amount of the offer, he was allowed costs of the whole suit up to the date of the offer.

Weldon, Q.C., for the plaintiff.

C. A. Palmer, Q.C., and A. H. Hanington, Q.C., for the defendant.

[15TH OCTOBER, 1895.]

McLEOD v. WELDON.

Evidence—Absolute deed—Cutting down to mortgage.

Although collateral evidence is admissible to show that, notwithstanding the plain terms of an absolute transfer of property, it was intended that the transferor should have a right of redemption, the evidence must be of the clearest and most conclusive character to overcome the presumption that the deed of transfer truly stated the transaction.

C. J. Coster, for the plaintiff.

Blair, A.-G., for the defendant.

NUTTEN v. WRIGHT.

Water and watercourses—Driving dam—Damage to land by overflow—Acts of former owner—Estoppel—Prescription—Additional damage.

A driving dam was constructed above the plaintiff's land by the defendants for the purpose of driving their logs, with the result that the river overflowed its banks and damaged the plaintiff's property. The plaintiff's husband had assisted in building the dam as an employee of the defendants, being at the time himself the owner of the land.

Held, that the plaintiff was not estopped from maintaining an action for the injury to her property.

Gradual and increasing damage to the banks of a river by driving operations, extending over a number of years, will give a right to commit further acts of additional damage.

White, S.-G., and Allison, for the plaintiff.

McLeod, Q.C., and M. G. Teed, for the defendants.

LAME v. GUERETTE.

Costs—Disclaimer—Conduct before action.

The defendant, being asked by the plaintiff if he claimed any interest in certain machinery upon premises mortgaged to the plaintiff, made use of equivocal language not amounting to a disclaimer. Upon being made a party to a suit for the recovery of the machinery, he disclaimed. The plaintiff did not accept the disclaimer and the cause proceeded to a hearing.

The Court, in dismissing the bill as against this defendant, awarded costs.

White, Q.C., for the plaintiff.

McLeod, for the defendant.

In re FOXWELL.

And trustees—Advice—Equity Act, 1890, s. 212—Contest over fund.

The Court will not, under s. 212 of the Equity Act, 1890, settle the rights of competing parties to a fund in the hands of trustees. The section only enables the Court to advise trustees and trustees in matters of discretion vested in them.

White, for the petitioners.

[22ND NOVEMBER, 1895.]

MOORE v. MOORE.

Parent and child—Advancement—Evidence—Intention.

Where a mother makes a purchase in the name of her child, there is a presumption that an advancement is intended; it is for the plaintiff to adduce evidence whether there was an intention to advance.

The defendant did not appear.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 6TH DECEMBER, 1895.]

BOLE v. ROSE.

Notice of motion—Stranger to suit—Statement of residence—Amendment—Costs.

Under a writ of execution a sheriff seized goods upon the premises occupied by the execution debtor, whose landlord served a notice claiming three months' arrears of rent, but the sheriff refused to recognize his claim. The landlord then served a notice of motion claiming payment of the rent out of the moneys in the hands of the sheriff. Under the old practice such an application might have been made in the original suit by rule *nisi* or summons. By the Queen's Bench Act, 1895, Rule 416, no summons or rule to show cause shall be granted, and a notice of motion is substituted. The landlord therefore applied by notice of motion, and the execution creditor appeared to answer the motion.

The objection was taken that this was the first proceeding in the action by the landlord, and the notice of motion should set out his residence, which it did not do.

Held, that under the recent Act the equity practice in the matter should be followed. Rule 972 showed that it was intended that a notice by which a proceeding was instituted should show the residence of the party moving. The notice of motion was defective, but the landlord might have leave to amend. From what was said when the objection was taken, there was no doubt the execution creditor knew the true residence, so the amendment might be made without costs.

Elliott, for the landlord.

Martin, for the execution creditor.

[9TH DECEMBER, 1895.]

DOLL v. HOWARD.

of proceedings—Transfer of cause from County Court to Queen's Bench—Appeal from order for transfer—Queen's Bench Act, 1895, s. 86—Examination for discovery—Motion to commit for non-attendance—Contempt of Court—Service of subpoena—Evidence of.

This was an application under Rule 390 of the Queen's Bench Act, 1895, to commit the defendant or to strike out his defence because of his failure to attend and submit to examination for discovery.

The action was begun in the County Court of Selkirk, and transferred to the Queen's Bench by an order of the County Judge under s. 86. The solicitor for the defendant, who had been served with the appointment for the examination, appeared before the examiner and objected to the examination going on with, on the ground that all proceedings in the County Court were at that time stayed.

When a writ was issued in the County Court, the defendant filed a notice of appeal, and on the 18th November the plaintiff's solicitor moved in the County Court, under s. 86, to have the order transferred to the Queen's Bench. To this motion the defendant's solicitor showed cause, and the Judge reserved judgment. He afterwards decided to grant the motion, and the plaintiff's solicitor at once got the order signed and procured the County Court to transmit the papers to the proper authorities of the Queen's Bench, which he did on the same day. At five o'clock the same day a copy of the order was served on the defendant's solicitor, and that was the first intimation he had of the order having been made. Immediately upon the opening of the County Court office on the morning of the 19th November, the defendant, under s. 317 of the County Courts Act, an affidavit of objection to appeal from the order; and the defendant contended that, by his doing so, all proceedings were stayed for two months from that day.

It was contended that the filing of the affidavit in this case could not be effect. Section 317 of the County Courts Act should be read in connection with ss. 315 and 316. All these provisions referred to and dealt with an order, decision, or judgment in any action, suit, matter, or proceeding in any County Court. When the affidavit was filed there was no action, suit,

matter, or proceeding in the County Court. Before the filing of the affidavit, the papers had been transmitted, so that the action had ceased to be an action in the County Court : s. 86; *Harris v. Judge*, [1892] 2 Q. B. 565; *Moody v. Stewart*, L. R. 6 Ex. 95; *Duke v. Davis*, [1893] 2 Q. B. 260.

There was, however, an objection which was fatal to the success of the motion. There was no sufficient evidence that the defendant was served with any subpoena. A subpoena and an appointment for examination were produced, and to these was annexed an affidavit, in which the deponent swore that he personally served the defendant with a true copy of the subpoena and of the appointment by delivering such *appointment* to and leaving the same with the defendant personally.

Upon a motion to put a party in contempt—and that was the motion here—the material on which the motion is made must be strictly correct.

Motion dismissed without costs.

Huggard, for the plaintiff.

Hough, Q.C., for the defendant.

In re RAPID CITY FARMERS' ELEVATOR CO.

Company—Winding-up—Demand by creditor—Insufficient evidence of petitioner being a creditor.

Petition under the Winding-up Act.

The petitioner claimed to be the assignee of a judgment recovered against the company, and based the application on a demand, served under s. 6 of the Winding-up Act, upon the secretary-treasurer, more than sixty days before presentation of the petition.

It was objected that there was no evidence that the petitioner was a creditor of the company when the demand was served. The demand called for payment of the amount of a judgment recovered on the 28th August, 1893, duly assigned to the petitioner. The assignment itself was not produced, and the only evidence on the subject was the statement in the petition, "subsequently to the recovery of the said judgment the same was duly assigned in writing to your petitioner, who is now entitled to payment of the judgment debt. Your petitioner is now the *bona fide* holder and owner of said judgment debt, and

the said company is now justly and truly indebted to him in the said sum of," etc. To that was annexed an affidavit of the petitioner that he had carefully read over the petition and believed the same to be true.

Held, that there was no evidence that the petitioner was a creditor when he made the demand. He might, for all that the evidence showed, have obtained an assignment of the judgment to become a creditor only on the day on which the affidavit was sworn to, long after the demand, and only three days before filing of the petition. On such insufficient evidence no order could be made for winding up the company. Petition dismissed with costs, liquidated at \$10.

W. H. Elliott, for the petitioner.

W. H. Lark, for the respondent.

[KILLAM, J., 10TH DECEMBER, 1895.]

WILKINSON v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Deed and agent—Sale of land—Agent's commission—Previous negotiations.

Adair, from a judgment of a County Court in favour of the plaintiff, who sued to recover a commission on an alleged sale of lands for the defendants. The plaintiff was instructed by the defendants' general manager to sell the land for the defendants. The plaintiff entered into a verbal agreement with Adair to sell the land to him, and received a deposit of \$250 out of the purchase money, which sum he transmitted to the manager, asking him to send agreement. Before entering into a verbal contract of purchase Adair had been furnished by the person, other than the plaintiff, with a list of lands which the defendants were offering for sale, had applied to the manager and been driven over the land in question by him and Adair, and of the price; the manager told him, if he should wish to close the transaction with one Beattie, another of the defendants. Instead of going to Beattie, Adair went to the plaintiff, and the result was the agreement and the deposit.

The plaintiff charged a commission of two and one-half per cent. and recovered judgment for that amount.

Held, that if the plaintiff honestly and in good faith, not knowing that the manager had referred Adair to Beattie to close the transaction, effected the agreement of sale, he would be entitled to the usual commission, notwithstanding that the previous negotiations might have contributed to bring about the sale, but here there was little doubt that Adair informed the plaintiff of his having been referred to Beattie. In such a case the previous instructions to sell would not warrant the one agent in taking up and completing the negotiations thus in progress with the principal or another agent, so as to entitle himself to reward. When the plaintiff advised the defendants of the sale and forwarded the deposit, his action was not repudiated. What had previously been mere negotiation had ripened into a verbal contract, through the services of the plaintiff, and the defendants took advantage of this contract and retained the money paid upon it. The evidence showed that the defendants' manager offered the plaintiff \$10, and that when a person brought the defendants a purchaser, they paid him one-half the usual commission, and when the amount paid was such that the sale could be considered assured, the other half was paid.

Amount of judgment reduced to \$10, without costs of the appeal, but as any liability was contested throughout, the defendants to pay the costs in the County Court.

R. M. Smith, for the plaintiff.

O. H. Clark, for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., 10TH OCTOBER, 1895.]

In re RING'S BAIL.

Criminal procedure—Recognizance of bail—Forfeiture—Order of Judge—Estreat roll—Writ of fieri facias and capias—Submission of, to Judge—Criminal Code, ss. 916-919.

A. E. Ring was committed for trial by a magistrate ON

charge. He was subsequently admitted to bail to the next sittings of the Supreme Court at Edmonton, to surrender himself into custody and plead to such the Crown prosecutor should lay against him, etc. Ring was one of the sureties on the recognizance.

At the next sittings a charge was laid against A. E. Ring, not to appear, and his bail was declared forfeited. The recognizance was duly estreated on a roll by the Court under the direction of the presiding Judge, in accordance with s. 916 of the Criminal Code; and thereupon the Court issued a writ of *fieri facias* and *capias* (form TTT), which was served to the sheriff for execution. The sheriff, finding that John T. Ring, took him under the *capias*.

A writ of *habeas corpus* was issued for a writ of *habeas corpus* to have the John T. Ring before a Judge in Chambers or for his removal from custody without the issue of a writ.

Mr. Taylor, Q.C., for John T. Ring, moved the summons and contended that the forfeiting and estreating of the recognizance, and consequently the writ of *fieri facias* and *capias*, issued thereunder, were invalid, because there was no order of the Judge touching the estreating or putting in the recognizance, as required by s. 918 of the Criminal Code, and because neither the roll nor the writ was submitted to the Judge before being sent to the sheriff, in accordance with s. 919.

Mr. Beck, Q.C., Crown prosecutor, showed cause and contended that s. 918 applied only to the cases to which s. 917 applied, and these two sections are to be read together, both of them from C. S. C. s. 99, while ss. 916 and 919 are from C. S. U. C. c. 117; and relied on in *Re Talbot's Bail*, 10 B. & L. 117.

He also contended that the provision that the sheriff submit the roll and writ to the Judge is directory and that omission to do so would not affect the validity of the writ issued nor any action of the sheriff under it.

The Court sustained the contention of the Crown upon both points and discharged the summons.

[28TH NOVEMBER, 1895.]

THE COMMERCIAL UNION ASSURANCE CO.
THE LANCASHIRE INSURANCE CO.

Issue—Summons—Writ—Doubt as to liability—Leave to join defendants—Statement of claim—Declaratory judgment.

10th October, 1895, ROULEAU, J., upon the applica-

tion of the plaintiff under s. 42 of the Judicature Ordinance, made an order allowing the plaintiff to issue a writ against the above-named defendants for the determination of the question of liability, as set forth in the affidavit filed upon the application. The affidavit showed that the plaintiff had paid the sum of \$50 as a premium for fire insurance to a person who acted as agent for both the defendants; that this agent had absconded with the money; that both companies had refused the risk, after the plaintiff had held an *interim* receipt from each in turn; and that both companies had refused to pay him the \$50, each alleging that the other was liable.

On the same day the plaintiff issued a summons under the provisions respecting small debt procedure contained in Ordinance No. 5 of 1894, and also served a statement of claim, asking the Court to determine which of the defendants was liable, and for judgment for \$50 accordingly.

Held, that the summons issued was a "writ" within the meaning of the order of ROULEAU, J. In s. 35 of Ordinance No. 5 of 1894 the summons prescribed by the small debt procedure provisions is styled "a writ of summons."

2. That the amount claimed being under \$100, the case fell within s. 27 of Ordinance No. 5 of 1894; the procedure under the Judicature Ordinance was made applicable to cases under this Ordinance by s. 49; and, under s. 42 of the Judicature Ordinance, the plaintiff, being in doubt, might, by leave, join two defendants to determine which, if either, was liable.

3. It was not the intention of the Legislature that a claim under the small debt procedure should answer all the requirements of a statement of claim, either as to form or substance; it is sufficient, under s. 51, if it is in substantial compliance with the terms of the Ordinance, which requires "a simple statement in writing of the cause of action . . . so that in each case it may be known or understood by a person of ordinary intelligence what the action is brought for."

4. It was unnecessary in this case for the plaintiff to ask for a declaratory judgment as to which of the defendants was liable, as a judgment against one would decide the question of liability between them; and the claim for such declaratory judgment, being unnecessary, did not affect the validity of the summons.

P. McCarthy, Q.C., for the plaintiff.

McCaul, Q.C., and *G. S. McCarter*, for the several defendants.

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